

1 STATE OF MINNESOTA DISTRICT COURT

2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

3 *****

4 Court File No. 62-CV-19-4626

5 Judge John H. Guthmann

6 In the Matter of the Denial
7 of Contested Case Hearing
8 Requests and Issuance of National

9 Pollutant Discharge Elimination

10 System/State Disposal System,

11 Permit No. MN0071013 for the

12 Proposed NorthMet Project,

13 St. Louis County, Hoyt Lakes,

14 and Babbitt, Minnesota.

15 *****

16 EVIDENTIARY HEARING

17 WEDNESDAY, JANUARY 22, 2020

18 VOLUME II, DAY 2 OF 7 (pp. 211 - 425)

19 *****

20 The evidentiary hearing (Day 2 of 7) came on
21 before the Honorable John H. Guthmann, District Court
22 Judge, in Ramsey County District Court on Wednesday, the
23 22nd day of January, 2020.

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25 REPORTED BY: Lori Morrow, RMR, RPR, CRR, CLR, CBC

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21 *****

1 P R O C E E D I N G S

2 THE CLERK: All rise. Ramsey County District
3 Court is now in session, the Honorable John H. Guthmann
4 presiding.

5 THE COURT: Have a seat, please.

6 Good morning, everybody.

7 ALL: Good morning.

8 THE COURT: Any preliminary matters?

9 Okay. Let's blast off -- hold on.

10 MR. GRILLOT: Good morning, your Honor.

11 THE COURT: Good morning.

12 MR. GRILLOT: I would just like to put
13 something on the record very briefly.

14 THE COURT: All right.

15 MR. GRILLOT: My name is Benjamin Grillo. I'm
16 here with the EPA.

17 EPA is not a party to this action, and I just
18 want to state on the record that I'm here solely in the
19 limited role to protect against the disclosure of
20 privileged information.

21 THE COURT: Okay.

22 MR. GRILLOT: Not a waiver of sovereign
23 immunity and all that.

24 (Reporter clarification.)

25 MR. GRILLOT: Not a waiver of sovereign

1 immunity.

2 THE COURT: And all that. You know what that
3 is.

4 All right. Let's make our connection.

5 (Reporter's Note: A connection was attempted
6 with Mr. Pierard on the ITV via a Zoom meeting
7 room.)

8 THE COURT: Do we know what the delay is or why
9 there is one?

10 MS. RAY-HODGE: The tech is checking out the
11 system on their end right now.

12 THE COURT: Okay.

13 MS. RAY-HODGE: Your Honor, I'm going to step
14 out and just call them real quick.

15 THE COURT: Okay.

16 MS. RAY-HODGE: Sorry, your Honor.

17 THE COURT: Promising.

18 MS. RAY-HODGE: Yes, promising. He said it
19 should be working now.

20 (Reporter's Note: A connection was established
21 with Mr. Pierard on the ITV via a Zoom meeting
22 room.)

23 THE COURT: A spontaneous display of emotion
24 from the jury box.

25 MS. MACCABEE: Can we also get one screen?

1 THE COURT: Yes, our favorite ceiling shot.

2 MR. BELL: Yeah, they're just testing right
3 now.

4 THE COURT: There we go. People are finding
5 their groove.

6 MS. MACCABEE: Excellent.

7 THE COURT: Are we ready to go, Mr. Pierard?

8 THE WITNESS: Yes, sir.

9 THE COURT: All right. We'll proceed.

10 DIRECT EXAMINATION (CONTINUING):

11 BY MS. MACCABEE:

12 Q Good morning, Mr. Pierard. How are you?

13 A Good morning. I'm good. Thanks.

14 Q Mr. Pierard, in your testimony yesterday, you
15 described -- I hope you recall statements from MPCA while
16 you were reading EPA's comments to MPCA on April 5, 2018,
17 that suggested to you that they were taking notes. Do
18 you recall those statements?

19 A Yes.

20 Q I'm going to ask you now to turn to
21 Exhibit 679, which is EPA's NPDES Permit Writers' Manual.
22 And I'm going to ask you to turn, after I ask a couple
23 questions, to the part of the manual that's at -- towards
24 the end, about 224. It's called -- it's on 11-8 is the
25 way it's designated in terms of the pages.

1 THE COURT: Hearing no objection, Exhibit 679
2 is received.

3 BY MS. MACCABEE:

4 Q Mr. Pierard, are you personally familiar with
5 the NPDES Permit Writers' Manual?

6 A Yes.

7 Q Does this manual provide guidance for NPDES
8 permit issuers?

9 A Yes.

10 Q And is that both the U.S. Environmental
11 Protection Agency, the EPA, and states that prepare NPDES
12 permits?

13 A Yes.

14 Q Based on your personal knowledge and
15 experience, does EPA train both its new permitting staff
16 and staff of the states who are doing NPDES permits on
17 the Permit Writers' Manual?

18 A Yes.

19 Q When you transferred from --

20 THE COURT: Do Relators take the position that
21 this manual has any force and effect of law as it relates
22 to the MPCA?

23 MS. MACCABEE: Your Honor, Relators take the
24 position that this is guidance that is applicable, and it
25 reflects customary and usual ways of doing business. We

1 do not take the position that it has the force of law,
2 sir.

3 THE COURT: Okay.

4 BY MS. MACCABEE:

5 Q Thank you.

6 When you transferred from the Wetlands and
7 Watershed branch to the NPDES program in 2010, did you
8 attend a training on EPA's NPDES Permit Writers' Manual?

9 A Yes.

10 Q Can you explain where that was and what the
11 training process was like?

12 A The training was in St. Paul, and that was in
13 mid 2010, I believe. It's generally a week-long course,
14 and EPA will offer these courses usually at least twice a
15 year nationally. You can also take the training online.

16 Q And could you just explain why it was important
17 for you to receive training on the Permit Writers'
18 Manual?

19 A Just so I understood the process. I wasn't --
20 you know, in my position, I wasn't reviewing permits. We
21 had staff doing that, and it was important that I
22 understood the process.

23 THE COURT: Why was the training in St. Paul,
24 if you know?

25 THE WITNESS: You know, a lot of times, states

1 will ask for the training to be in their locale. The
2 last one that I recall in Region 5, the Indiana
3 Department of Environment had asked for training to be in
4 Indianapolis, and EPA did that. So it's very likely that
5 Minnesota had asked.

6 THE COURT: Do we have the attendance list from
7 the 2010 training anywhere? No one knows?

8 THE WITNESS: I do not.

9 THE COURT: Okay. All right.

10 THE WITNESS: I do not.

11 THE COURT: All right. Go ahead.

12 BY MS. MACCABEE:

13 Q Mr. Pierard, if we look at page -- and I'm
14 going to have to take mine out because it's a mess --
15 page 11-8, do you see a box in the middle of the page
16 that's called Exhibit 11.5 [sic]?

17 A Yes.

18 Q And that's called "Elements of the
19 administrative records for a draft permit"?

20 A Yes.

21 THE COURT: It actually is 11-5.

22 MS. MACCABEE: Thank you.

23 BY MS. MACCABEE:

24 Q And do you see, I think it's the sixth bullet
25 down, the point "Correspondence with the applicant and

1 regulatory personnel"?

2 A Yes.

3 Q And then the paragraph below the box, do you
4 see the sentence, "The administrative record should
5 include all meeting reports and correspondence with the
6 applicant and other" --

7 THE COURT: Slow down. Slow down.

8 MS. MACCABEE: I'm sorry.

9 BY MS. MACCABEE:

10 Q -- "and correspondence with the applicant and
11 other regulatory agency personnel," and that also
12 includes "records of telephone conversations"?

13 MR. SCHWARTZ: Your Honor, I'm going to object.
14 This is not about whether EPA complies with its own
15 guidelines, which is what this manual is. The issue is
16 whether MPCA complied --

17 THE COURT: Do you --

18 MR. SCHWARTZ: -- with its own --

19 THE COURT: -- have an objection?

20 MR. SCHWARTZ: Yes.

21 THE COURT: What's your objection?

22 MR. SCHWARTZ: The objection is that it's
23 outside the scope of the proceeding.

24 THE COURT: This document is in evidence, so
25 it's fair to ask questions about documents that are in

1 evidence. And there's also testimony that this document
2 was used for -- suggested for use to the MPCA. So to the
3 extent that this document arguably should have been
4 considered, consulted by, or used by the MPCA, your
5 objection is overruled.

6 MR. SCHWARTZ: I just want to add that EPA may
7 prefer that MPCA follow EPA's standards and, I'm sure,
8 made the suggestion, but those suggestions are not law
9 that MPCA has to comply with and has to comply with its
10 state rules and regulations. And that's why we're
11 submitting that this should be outside the proceeding.

12 THE COURT: I get that, and Ms. Maccabee
13 admitted that earlier. And my question was whether this
14 is legally binding. What is in dispute here is the
15 extent to which this manual, whatever weight it should
16 have, if it's not followed would reflect a procedural
17 irregularity. That appears to be a fact dispute. And
18 you'll be able to argue the -- the parties will be able
19 to argue the relevance or irrelevance of this manual.

20 Let's pick up.

21 MS. MACCABEE: Do we need to -- did we have a
22 question before on the record?

23 THE COURT: Probably. Hopefully, because there
24 was an objection.

25 THE COURT REPORTER: Do you want me to read it?

1 MR. SCHWARTZ: We try to relate them.

2 THE COURT: Yes.

3 MS. MACCABEE: I would appreciate that.

4 THE COURT: It's one of the things I'm trained
5 to look for.

6 THE COURT REPORTER: The question was, "And
7 then the paragraph below the box, do you see the
8 sentence, 'The administrative record should include all
9 meeting reports and correspondence with the applicant and
10 other' -- 'and correspondence with the applicant and
11 other regulatory agency personnel,' and that also
12 includes 'records of telephone conversations'?"

13 THE COURT: Why don't you reask the question so
14 the witness is oriented.

15 BY MS. MACCABEE:

16 Q Mr. Pierard, if you're looking at page 11-8 and
17 the paragraph below Exhibit 11-5, what guidance does the
18 Permit Writers' Manual give NPDES permit issuers about
19 the need to preserve correspondence with other regulatory
20 agencies and records of telephone conversations?

21 MR. SCHWARTZ: Objection, it's leading.

22 THE COURT: Overruled.

23 THE WITNESS: The guidance is that the
24 administrative record should contain meeting notes and
25 correspondence with the applicant and other regulatory

1 agency personnel. Other notes, trip reports, records,
2 telephone conversations should also be included in the
3 administrative record.

4 BY MS. MACCABEE:

5 Q And then very close to that, if you want to
6 turn to page 11-16, Exhibit 11-9, which is another box in
7 the middle of the page. Have you found that, sir?

8 A Exhibit 11-6?

9 Q Exhibit 11-9 on page 11-16.

10 A Okay, I'm there.

11 Q And that box is called ele -- we have some
12 strange noises. Are we good?

13 We have a box called "Elements of the
14 administrative records for a final permit." And do you
15 see the first bullet that says, "All elements for the
16 draft permit administrative record (see Exhibit 11-5)"?

17 A Yes.

18 Q Does that first bullet in Exhibit 11-9 of the
19 manual carry over the elements for the draft permit
20 administrative record as elements of the administrative
21 record for a final permit?

22 A Yes.

23 Q So would the manual's guidance suggest that
24 correspondence with other regulators or records of
25 telephone conversations should be part of the record also

1 for a final NPDES permit?

2 MR. SCHWARTZ: Objection, the question is
3 leading.

4 THE COURT: Sustained.

5 BY MS. MACCABEE:

6 Q Mr. Pierard, I'm just going to repeat the
7 question in a slightly different format.

8 In your opinion, would the manual's guidance
9 that correspondence with other regulators or records of
10 telephone conversations be part of the record also apply
11 to a final NPDES permit?

12 MR. SCHWARTZ: Objection, it's leading.

13 THE COURT: Sustained.

14 BY MS. MACCABEE:

15 Q Mr. Pierard, looking at Exhibit 679, and in
16 that document Exhibit 11-9, "Elements of the
17 administrative records for a final permit," what would
18 that guidance say as far as the need to keep
19 correspondence with other regulators or records of
20 telephone conversations as part of a final NPDES permit?

21 MR. SCHWARTZ: Objection again. It's still
22 leading.

23 THE COURT: Overruled.

24 THE WITNESS: So then it references
25 Exhibit 11-5, so the implication there is that any

1 correspondence with regulatory agencies, with permittee,
2 meeting notes, notes of telephone conversations would be
3 included in the administrative record for the final
4 permit as well.

5 BY MS. MACCABEE:

6 Q Now I'm going to ask you -- this is a slightly
7 different part of the NPDES permit manual. If you want
8 to turn back to the introduction, and that's on page VII,
9 Roman numeral VII.

10 A All right. That's -- the heading of that page
11 is "Introduction to the Manual." Is that the right page?

12 Q That is correct, sir.

13 A Yes, I'm there.

14 Q And what is -- if you look at the paragraph
15 that's marked -- in the middle of the page that's marked
16 "Purpose of the Manual," you can take a minute to read
17 that and explain to -- and then tell us what do you
18 understand to be the purpose of the NPDES Permit Writers'
19 Manual and to whom it applies when it talks about
20 permitting authorities.

21 A Well, what it says is that -- it says this is
22 "a general reference for permitting authorities." So
23 that would be EPA or authorized states. And it also says
24 that it's guidance that explains the core elements of an
25 NPDES permit program. But it is something that could be

1 adjusted by -- to accommodate state law or state rules.

2 Q And is that consistent with your understanding
3 of how this NPDES Permit Writers' Manual is used, that it
4 is a general guide for states as well as EPA but can be
5 modified if there are state statutes or rules that are
6 different?

7 A Yes.

8 Q You briefly testified yesterday that EPA had
9 asked questions and raised concerns about the draft
10 PolyMet permit in conference calls during the public
11 comment period in January, February, and March of 2018.
12 Do you recall that testimony?

13 A Yes.

14 Q And can you just summarize some of the issues
15 that EPA raised questions and touched upon in oral
16 conferences with MPCA during that public comment period?

17 A During the comment period, in conversations
18 with PCA, we were kind of focused in on specific aspects
19 of the permit that looked problematic to us, where MPCA
20 could help explain what their thought process was, how
21 they developed the permit. There was a good deal of
22 discussion about specific aspects of the permit, the
23 operating limits versus what are quality-based effluent
24 limits, the enforceability of a permit, concern about
25 permit shield issues, concern about permit modifications,

1 things like that.

2 Q And was there any discussion, to the best of
3 your recollection, about the construction stormwater
4 issue and transfer of the Cliffs Erie permit in those
5 conference calls with MPCA?

6 A Yes.

7 Q And was there any discussion between the EPA
8 and MPCA about impacts of some of these issues on a
9 downstream state?

10 A Yes.

11 Q And what would that downstream state have been?

12 A The Fond du Lac Tribe.

13 Q In your view, was the character and nature of
14 EPA's oral comments in these phone conferences with MPCA
15 during the public comment period different from EPA's
16 comment letter on the draft PolyMet permit that was
17 prepared in March of 2018 and read aloud to MPCA on
18 April 5, 2018?

19 A It was along those lines. I mean, a lot of the
20 topics that were contained in the draft letter that we
21 read to PCA were topics that we brought up during the
22 calls we had in early 2018.

23 Q Was there something -- anything different about
24 the EPA's comment letter that was completed by March 15
25 and the oral comments that were relayed to MPCA in the

1 conference calls that you had?

2 A I'm not sure I understand your question.

3 Q Was there a different type of information or
4 detail or anything else different about the written
5 comments as contrasted with the oral comments?

6 A The oral comments delivered in January and
7 February of 2018, is that what you mean?

8 Q Yes, sir.

9 A Well, sure. What we were trying to do in the
10 oral conversation was hone in on and ascertain whether we
11 actually had a real issue with the -- with specific
12 aspects of the permit. Just an example, we had a high
13 degree of interest in water quality-based effluent
14 limits, and we wanted to be sure in the conversations
15 that we understood what MPCA was going to incorporate
16 into the permit relative to that. But we hadn't seen any
17 permit language, so, you know, again -- I brought this up
18 yesterday. It's really difficult for us to make well
19 thought out comments in a permit that we hadn't seen. We
20 just heard verbally what the state agency was
21 considering. So we were trying to get a better handle on
22 what we were likely to see.

23 Q And then by January 31, 2018, were you just
24 reacting for the first time to the permit language?

25 A Yes.

1 Q Do you believe that EPA's written comments on
2 the draft PolyMet permit provided a different type of
3 detail and rigor than the oral comments and questions
4 that you raised in the conference calls?

5 A Oh, yes, without a doubt. That was why when we
6 didn't send those comments I felt so strongly about
7 reading the comments to MPCA to make sure that they
8 understood exactly what we were saying and what our
9 concerns were and how to rectify that.

10 Q Mr. Pierard, you testified yesterday that if
11 EPA had sent its written comments on the draft PolyMet
12 permit to MPCA during the public comment period, that
13 these comments would have been in the administrative
14 record when the permit was issued. Based on your
15 experience as NPDES program chief for EPA, was it a
16 standard procedure in state-issued permits to include
17 EPA's comments in the administrative record?

18 A Yes.

19 Q Let's turn briefly back to the NPDES Permit
20 Writers' Manual, which is Exhibit 679, and let's look
21 again on page 11-16 at the box in the middle of the page
22 that is Exhibit 11-9, "Elements of the administrative
23 records for a final permit."

24 A All right. I'm there.

25 Q What's the second bullet in Exhibit 11.9?

1 A It is the administrative record for the final
2 permits. It should contain "all comments received during
3 the comment period."

4 Q And is that consistent with your view of what
5 was the regular practice with states and EPA?

6 A Yes.

7 Q I think we have one more page in the Permit
8 Writers' Manual. If you could turn -- let's see. Let's
9 turn to the -- just a couple pages back to the bottom of
10 page 11-8 and the top of page 11 -- not -- I'm sorry.
11 It's 11-12 and the top of 11-13. Let me know when you've
12 found it.

13 A I'm there.

14 Q Okay. And if you just want to summarize what
15 it talks about at the bottom of page 11-12 and the top of
16 11-13 in the Permit Writers' Manual, Exhibit 679.

17 A It's just relating that the agency must respond
18 to all significant comments that are received at the time
19 the final permit decision is reached.

20 Q And that statement, does that cross-reference a
21 provision of regulations?

22 A Yes.

23 Q And is that based on regulations implementing
24 the Clean Water Act?

25 A Yes.

1 Q And in looking at that page in the manual and
2 the reference to the regulations, do the manual and
3 regulations require a, quote, description and response to
4 significant comments on the permit application raised
5 during the public comment period?

6 MR. SCHWARTZ: Object to the form of the
7 question. It assumes that this manual imposes
8 requirements on the state. And we've had testimony
9 saying it doesn't.

10 THE COURT: Just a second.

11 Sustained as phrased.

12 BY MS. MACCABEE:

13 Q Does the manual at -- which on pages 11-12 to
14 11-13 state that responses to comments should include a
15 description and response to all significant comments on
16 the permit application raised during the public comment
17 period?

18 A Yes.

19 Q And in your experience, when EPA provides a
20 state or provides Minnesota with a written comment
21 letter, has MPCA prepared responses to comments that
22 specifically describe EPA's comments and then respond to
23 them?

24 A Yes.

25 Q And that's the customary practice, is it -- or

1 is that the customary practice?

2 MR. SCHWARTZ: Objection. It's leading.

3 BY MS. MACCABEE:

4 Q Is that the customary practice?

5 THE COURT: Overruled.

6 THE WITNESS: Yes, it is.

7 BY MS. MACCABEE:

8 Q If we could turn now to Exhibit 527.

9 A All right. I've got it.

10 Q Let's turn now to Exhibit 527, which is the
11 official MPCA board packet for the Keetac mine permits
12 provided on October 14, 2011 that contains both findings
13 and responses to comments.

14 THE COURT: There being no objection,
15 Exhibit 527 is received.

16 BY MS. MACCABEE:

17 Q Do you recall in your testimony yesterday that
18 we discussed EPA's comment letter on the draft Keetac
19 NPDES permits during the public comment period?

20 A Yes.

21 Q And if you could please turn to page 7 of the
22 responses to comments. And this is a big packet, so they
23 actually start at the page Relators 63196.

24 A All right. I'm there.

25 Q And do MPCA's responses to comments for the

1 Keetac mine specifically identify and describe EPA's
2 comments on the draft permit?

3 A Yes.

4 Q As a matter of fact, do they even specify your
5 name as their author?

6 A Yes.

7 Q So do you see in Exhibit 527 clear comments
8 from the EPA identified as "EPA Comments"?

9 A Yes.

10 Q And do you see responses then to those
11 comments?

12 A Yes.

13 Q I've got another one. If you could turn now to
14 Exhibit 529.

15 A All right. I've got it.

16 Q Thank you. And this one is a little easier
17 because it's just the comments. These are Mesabi Nugget
18 responses to comments made in February 2012. Do you
19 recall in your testimony --

20 THE COURT: Hold on.

21 MS. MACCABEE: I'm sorry.

22 THE COURT: There being no objection to
23 Exhibit 529, the exhibit is received.

24 BY MS. MACCABEE:

25 Q Do you recall in your testimony yesterday that

1 you discussed EPA's comment letter on the draft Mesabi
2 Nugget NPDES permit during the public comment period?

3 A Yes.

4 Q If you could turn again to page 7 of
5 Exhibit 529, which are the responses to comments in the
6 Mesabi Nugget case, do you see MPCA's responses to
7 comments on the -- provided by the U.S. EPA?

8 A Yes.

9 Q And do those responses to comments specifically
10 identify the comments by the Environmental Protection
11 Agency?

12 A Yes.

13 Q And do they even include the name of the
14 preparers?

15 A Yes.

16 Q And who were the people who were identified as
17 the commenters from the U.S. EPA?

18 A Myself and Linda Holst.

19 Q And for each of these comments, does the MPCA
20 say specifically what the response was to EPA's comments?

21 A Yes.

22 Q One more MPCA mining permit. And this is
23 Exhibit 533 are the Findings of Fact, Conclusions of Law
24 and Order and also the responses to comments on the
25 Minntac permit signed by Commissioner Stine on

1 November 30, 2018. And --

2 THE COURT: There being no objection,
3 Exhibit 533 is received.

4 BY MS. MACCABEE:

5 Q And in terms of looking for the comments, if
6 you could turn to the EPA comments, which start on
7 Relators page 63547, and the first comment is labeled
8 4-1.

9 A Okay. I'm there.

10 Q Do the MPCA responses to comments for the
11 Minntac mine permit specifically describe what EPA's
12 comments were?

13 A Yes.

14 Q And do they do so even when the response to
15 comments is cross-referenced to a comment made by another
16 commenter as well?

17 A Yes.

18 Q And are you familiar with this pattern where
19 the response to comments cross-references another
20 commenter's comment as well?

21 A Yes.

22 Q And can you explain why that -- what that means
23 when you take a look at the comments and the responses?

24 A Other commenters had submitted similar
25 comments, and the response to our comment would be

1 noted -- would reference back to the response to the
2 other person's comment, the similar comment that was
3 made.

4 THE COURT: So instead of drafting a brand new
5 comment, the box labeled 4-1 for the MPCA response refers
6 to a different response?

7 THE WITNESS: Yes.

8 THE COURT: Okay.

9 BY MS. MACCABEE:

10 Q And that response in 4-1, however, still
11 specifically identifies what EPA's comment was, doesn't
12 it?

13 A Yes.

14 Q Do you recall in late April 2018 discussing how
15 MPCA proposed to provide responses to EPA's comments on
16 the draft PolyMet NPDES permit if they were similar to
17 those of other commenters?

18 A No, I don't. We -- there was an indication
19 from MPCA that even early on before the close of comment
20 period that our comments would be similar to others.

21 Q I'm going to show you Exhibit 774.

22 MR. SCHWARTZ: Objection. We don't know who
23 prepared this -- these notes.

24 MS. MCGHEE: Your Honor, we have the same
25 objection.

1 This is Davida McGhee for PolyMet.

2 THE COURT: All right. Was there a foundation
3 objection to this document made previously --

4 MR. SCHWARTZ: Your Honor --

5 THE COURT: -- or is this a hearsay objection?

6 MR. SCHWARTZ: Well, it is that. But on top of
7 that, I suspect that at the time when foundations
8 objections were made, we may not have seen this. This
9 may have been one of the late entries into the hearing.

10 THE COURT: All right.

11 MS. MCGHEE: PolyMet --

12 THE COURT: When was this document added to the
13 exhibit list?

14 MS. MACCABEE: Your Honor, this document was
15 added to the exhibit list -- it was part of the package
16 of documents on December 27 --

17 THE COURT: Okay.

18 MS. MACCABEE: -- 20- --

19 THE COURT: So there was no waiver of
20 foundation.

21 MS. MACCABEE: Correct.

22 THE COURT: So if you wish to use this
23 document, establish its foundation and any applicable
24 hearsay objection -- exception.

25 MS. MACCABEE: Yes, your Honor.

1 BY MS. MACCABEE:

2 Q Is this document EPA's notes from April 30,
3 2018, of a staff person who was present at the meeting?

4 A I believe so, yes.

5 Q And have you reviewed this document through
6 EPA's FOIA online website as one of the documents
7 released by EPA under the Freedom of Information Act?

8 A Yes.

9 Q And did you participate in the phone call with
10 MPCA described in these notes?

11 A Yes.

12 MR. SCHWARTZ: Your Honor, the witness'
13 testimony about the authorship and even the source of
14 these notes doesn't indicate that he's testifying from
15 personal knowledge.

16 THE COURT: That was a speech, not an
17 objection. And wait until the foundational questions are
18 completed before you make a final objection to
19 foundation. So I anticipate the questions being asked
20 and that the exhibit get offered. You can object if you
21 still have an objection at the time the exhibit is
22 offered.

23 BY MS. MACCABEE:

24 Q And, Mr. Pierard, do these notes reflect the
25 official work of the EPA conferring with MPCA on the

1 PolyMet permit?

2 A Yes.

3 Q And based on your recollection of the call and
4 your knowledge of your own staff, are these notes
5 trustworthy and consistent with your recollection?

6 A Yes, they are.

7 MS. MACCABEE: And, your Honor, I do not have
8 with me today the document enclosure that would establish
9 who authored the comment, though it is on our exhibit
10 list. And I can find that for you if it's necessary,
11 your Honor.

12 THE COURT: Why don't you find it.

13 MS. MACCABEE: Your Honor, would you like -- it
14 would be in the area of 770 to 773. And I think if you
15 looked at the list of exhibits from Mr. Pierard, you'll
16 find it. But if not, just look at the main exhibit list.

17 Your Honor --

18 THE COURT: Yes.

19 MS. MACCABEE: -- it is Exhibit 767, and I
20 would be happy to provide a copy to the Court.

21 THE COURT: What is Exhibit 767?

22 MS. MACCABEE: Exhibit 767 is a December 18,
23 2019 disposition letter from the EPA to WaterLegacy, and
24 it -- oh, this is not the correct document. I'm sorry.

25 MR. SCHWARTZ: Could it be 773?

1 MS. RAY-HODGE: Yes.

2 MS. MACCABEE: I believe that's correct.

3 MS. RAY-HODGE: Yeah, 773.

4 MS. MACCABEE: It's Exhibit 773. And that is
5 a --

6 THE COURT: Lo and behold, it's in sequence.

7 MS. MACCABEE: I said it was between 770 and
8 773, your Honor. But that is a disposition letter dated
9 December 19, 2019, which, however, was not provided until
10 a week later. And enclosure A on Relators page 665007
11 identifies a single call with MPCA for which there are
12 notes, and those are the notes of author Krista McKim.

13 THE COURT: So if I am to understand correctly,
14 Exhibit 773 documents the Freedom of Information Act
15 disclosure that resulted in your downloading of
16 Exhibit 774?

17 MS. MACCABEE: Yes, your Honor, that's correct.

18 THE COURT: Okay. Any other foundation before
19 you offer the exhibit?

20 MS. MACCABEE: No, sir.

21 THE COURT: All right. Are there any
22 objections?

23 MR. SCHWARTZ: Yes. We object. What I would
24 like to do is read from Exhibit 773. It's the second
25 page in the --

1 THE COURT: Does someone have that for me,
2 Exhibit 773?

3 MS. MACCABEE: Here, your Honor.

4 THE COURT: All right. Hold on.

5 MR. SCHWARTZ: And it's the second --

6 THE COURT: Just a second.

7 MR. SCHWARTZ: Sure.

8 THE COURT: Okay. Go ahead.

9 MR. SCHWARTZ: It's the second paragraph, which
10 starts "The agency."

11 THE COURT: Yes.

12 MR. SCHWARTZ: It says, "The agency would like
13 to provide some context for the records that are produced
14 today. These are the personal notes of individual staff.
15 The staff taking these notes did so for their personal
16 use, and, for that reason, some notes may be
17 disorganized, unpolished, or otherwise reflect that the
18 staff did not intend that the notes would be used by
19 others. While the agency does not necessarily take the
20 position that these personal notes are subject to the
21 FOIA, they are being produced today in the interest of
22 transparency."

23 THE COURT: All right.

24 MR. SCHWARTZ: And so what I would suggest to
25 you is that the reliability of the notes is in question

1 and doesn't merit admission into the record.

2 THE COURT: All right. These notes in
3 Exhibit 774 are similar to other notes that were produced
4 by the Freedom of Information Act that were admitted into
5 evidence yesterday under Minnesota Rule of Evidence
6 803(8). These are clearly admissible in public records
7 as an exception to the hearsay rule. There's no question
8 about their authenticity. The witness has further
9 testified that the document is consistent with his
10 recollection of the meeting, so this document could
11 potentially have multiple uses. First of all, it's
12 admissible, in and of itself, as an exception to the
13 hearsay rule for which foundation of authenticity has
14 been established. So the foundation was established, and
15 the hearsay objection was addressed pursuant to the
16 exemption or exception set forth in 803(8). Moreover,
17 the document, even if it wasn't admissible itself, to the
18 extent it refreshes the witness' recollection and is
19 consistent with the witness' recollection, could be used
20 for that purpose as well. Either way, the objection is
21 overruled.

22 You can have your document back.

23 MS. MACCABEE: Thank you, your Honor.

24 My apologies that it took us a while to find
25 it.

1 THE COURT: You may proceed.

2 BY MS. MACCABEE:

3 Q Mr. Pierard --

4 A Yes.

5 Q If you could turn to Exhibit 774, and about a
6 third of the way down the page, do you see the sentence,
7 "EPA comments that we discussed a few weeks ago, some
8 overlap with contested case hearing comments." Do you
9 see that? And does that --

10 A Yes.

11 Q Sir, is that consistent with the testimony you
12 just gave before we looked at the document, that MPCA
13 talked about how EPA's comments overlap those of some
14 members of the public who had also commented?

15 A Yes.

16 Q And do you see right below that, the next
17 sentence, "MPCA's responses to comments won't directly
18 address EPA's concerns, but they view our comments to be
19 similar to other comments that were raised."

20 A Yes.

21 Q Do you recall -- or I'm sorry. Did you ever
22 agree on behalf of EPA's NPDES program that if other
23 commenters raised similar issues, MPCA need not describe
24 EPA's comments so as to attribute them to EPA?

25 A No, I never agreed to that.

1 Q And would you have agreed to that?

2 MR. SCHWARTZ: Objection, calls for
3 speculation.

4 THE WITNESS: No.

5 THE COURT: Sustained. The answer is stricken.

6 BY MS. MACCABEE:

7 Q Now, after April 5, 2018, when you read EPA's
8 comments aloud to MPCA staff, did EPA continue to confer
9 with MPCA in an attempt to resolve concerns raised by the
10 comments on the draft PolyMet permit?

11 A Yes.

12 Q And did EPA continue to raise the same concerns
13 that were in that March 18 comment letter that was read
14 aloud on April 5, 2018?

15 A Yes.

16 Q Now, in December 2018, was it a standard
17 practice for the EPA Region 5 NPDES program to write a
18 memo of any outstanding issues when the permit process
19 was concluding?

20 MR. SCHWARTZ: Objection, your Honor. This
21 goes to the merits of the permit, and that is outside the
22 scope of this proceeding.

23 THE COURT: Response?

24 MS. MACCABEE: Your Honor, you want me to
25 respond, sir?

1 THE COURT: If anyone wants to --

2 MS. MACCABEE: Yes, I would --

3 THE COURT: -- respond, they can respond.

4 MS. MACCABEE: -- like to. You were looking at
5 the witness. That's why I was asking.

6 THE COURT: I was looking into space because I
7 was thinking.

8 MS. MACCABEE: Your Honor, I'm just asking him
9 about standard practices of his program as far as
10 producing a concluding memo. And then I'm going to ask
11 him about whether in this case the documentation at the
12 end of the permit process was different and tie that back
13 to the irregular procedures in this case.

14 THE COURT: I don't know if I have enough
15 information to respond to your objection yet. I guess
16 I'm interested in knowing whether this is a concluding
17 memo that is internal to the EPA, is this a concluding
18 memo that is delivered to the public or placed in the
19 MPCA's administrative record, is this a concluding memo
20 that gets written even if the permit is approved, and if
21 the permit is approved by the EPA, what difference does
22 the concluding memo make?

23 MS. MACCABEE: Your Honor, we will ask the
24 witness to explain what the purposes of a closing memo
25 is, how they were used, when they were issued, and then

1 if this one is different from other concluding memos, and
2 to tie any differences back, actually, to the irregular
3 procedures, as well as to talk about how the concluding
4 memo describes the irregular procedures.

5 THE COURT: Is it your ultimate goal to offer
6 the concluding memo?

7 MS. MACCABEE: Yes, sir, it is.

8 THE COURT: And is there going to be an
9 objection to the concluding memo if it's offered?

10 MR. SCHWARTZ: Yes, there will be.

11 THE COURT: All right.

12 MS. MACCABEE: And --

13 THE COURT: Well, let's start with the
14 predicate and see where it takes us.

15 MS. MACCABEE: And, your Honor, if you are
16 interested, once we've established that predicate, I'm
17 happy to tie our proposal to introduce this document into
18 evidence to the specific procedural irregularities and
19 also to the exceptions that you described yesterday and
20 specifically that this is in response to defenses that
21 were raised by MPCA in their pretrial brief and also that
22 this exception relates to prejudice, which is how do
23 you -- how do Relators demonstrate that there's anything
24 different because of the procedural irregularities in
25 this case. And that's one of the things that this

1 closing memo documents.

2 THE COURT: Right. As opposed to one
3 employee's personal objection to what occurred, which
4 isn't the official position of the agency. And so
5 that's -- we need to sort that out.

6 MS. MACCABEE: And, your Honor, I would just --

7 THE COURT: The agency might end up -- the EPA
8 might end up objecting, too, and I -- I just want to make
9 sure that everyone knows where we're going, so --

10 MS. MACCABEE: And, your Honor, I'm going to --

11 THE COURT: -- we are ready.

12 MS. MACCABEE: I'm going to suggest that --
13 I've already communicated in writing with the Department
14 of Justice, and they do not object to this memo. They
15 only object to us asking the witness about deliberative
16 conversations that led to or are summarized in the memo,
17 and we have agreed not to do that. But the memo itself
18 was released to WaterLegacy by EPA under the Freedom of
19 Information Act. So it is -- to the extent that the
20 document itself may or may not contain the deliberative
21 privilege, that was explicitly waived by the production
22 under the Freedom of Information Act.

23 THE COURT: Okay.

24 MR. SCHWARTZ: Your Honor, I would just like to
25 make a couple points. One is, this memo never was sent

1 to EPA [sic]. It was eventually leaked or obtained.

2 THE COURT: Never was sent to the --

3 MR. SCHWARTZ: Sent to -- I'm sorry, to MPCA.

4 THE COURT: All right.

5 MR. SCHWARTZ: And it was certainly not sent to
6 them, and they had never seen it before the MPCA issued
7 the permit.

8 Second thing is, the permit was approved. And
9 there's no indication that this memo contains the
10 official position of EPA, which means that it contains a
11 separate position of EPA -- a separate position of EPA
12 staff rather than an official EPA position. And so for
13 those reasons, since we're talking about it, we believe
14 it shouldn't be admitted.

15 THE COURT: All right.

16 We have one more person.

17 MR. GRILLOT: Your Honor, I just want to say
18 that EPA did release this under the Freedom of
19 Information Act. To the extent that it contains factual
20 information about discussions or conversations that
21 occurred with dates and specifics, we have no objection.
22 To the extent the questioning would then go into the
23 internal decision-making process with EPA or specific
24 conversations with attorneys, that is what we would
25 object to. So the factual information that's contained

1 in here we do deny.

2 MR. SCHWARTZ: Your Honor, what this memo is
3 about is dissatisfaction by Mr. Pierard with the approval
4 of the final permit. That's what it boils down to.

5 MS. MACCABEE: Your Honor --

6 THE COURT: Okay. So, therefore, I need you to
7 tell me, Ms. Maccabee, how this memo is relevant to these
8 proceedings.

9 MS. MACCABEE: Your Honor, that's what the
10 witness is going to do. And before I ask -- I mean,
11 unless you would like me just to narrate for you.

12 THE COURT: Well, I would like you to make a
13 legal argument --

14 MS. MACCABEE: Okay.

15 THE COURT: -- that responds to the objection,
16 which on its face is well founded. It's irrelevant to
17 these proceedings whether a person within the EPA didn't
18 like the fact that his agency, the EPA, approved the
19 permit and didn't file any public objection or comment to
20 the permit in its final form.

21 MS. MACCABEE: Your Honor, counsel for the MPCA
22 has mischaracterized this document in several ways.
23 First, this is not the opinion of a single individual.
24 As with the comment letter of March 15, 2018, and the
25 deficiency letter of November 3, 2016, this is a letter

1 prepared by the program staff, and Mr. Pierard was not
2 acting on his own. This is a customary thing at the end
3 of a permit process to indicate the issues that were not
4 resolved. And the reason -- and this document also
5 contains factual information, which is contemporaneous or
6 a near contemporaneous record of what happened in the
7 permit process, and then the document goes through issues
8 that were resolved and not resolved. And because MPCA
9 did not provide any responses to comments that identified
10 the comments by EPA, there is no other record of what the
11 comments were by EPA and whether or not they were
12 resolved completely, partially, or not at all. And so it
13 is the irregular procedures, number one, the suppression
14 of the comment letter, and number two, the fact that
15 there were no responses to comments that specifically
16 identified and describe EPA comments that resulted in
17 this letter being a long document rather than the
18 customary way in which these posing memos tended to be
19 two to four pages highlighting just a couple issues for
20 future reference within EPA.

21 THE COURT: If everything you just said is
22 true, then why didn't the EPA reject the permit?

23 MS. MACCABEE: Your Honor, from the perspective
24 of Relators, what EPA decided and why they decided is, A,
25 impenetrable to us and, B, outside the scope of this

1 proceeding.

2 THE COURT: Right.

3 MS. MACCABEE: And what is not outside the
4 scope of the proceeding is what documentation was missing
5 from this record because of the -- both the failure to
6 have the comments in the record and the failure to have
7 the responses to comments. And this kind of information
8 about what the EPA comment was and whether or not it was
9 resolved would have been provided if there had not been
10 irregular procedures. And so this is the kind of
11 documentation that shows how Relators were prejudiced.
12 And that is really a critical part.

13 Now, I also want to say that --

14 THE COURT: But how are Relators prejudiced if
15 the EPA, possessing all of this knowledge, approved the
16 permit?

17 MS. MACCABEE: Your Honor, whether or not
18 the --

19 THE COURT: Because it's the EPA who had that
20 right. The EPA granted permission to the MPCA --

21 MS. MACCABEE: Well --

22 THE COURT: -- to do what it did. It delegated
23 its Clean Water Act authority to approve NPDES permits to
24 the State of Minnesota pursuant to a memorandum of
25 agreement retaining the right to veto the final product.

1 Did I make any mistakes --

2 MS. MACCABEE: A couple.

3 THE COURT: -- in laying that out?

4 MS. MACCABEE: Slightly. And here's the big
5 thing. The Minnesota Pollution Control Agency keeps
6 saying that EPA approved the permit. There was no letter
7 from MPCA asking them to approve. There was no letter
8 approving. There was not even a letter saying not
9 object. The fact that you --

10 THE COURT: Well, under the MOA --

11 MS. MACCABEE: And, sir --

12 THE COURT: Hold on. Under the MOA, if they do
13 nothing, they have approved the permit. That's what the
14 MOA says, right?

15 MS. MACCABEE: Yes. And, your Honor, what
16 we're doing with this letter -- and the witness will
17 explain how their program staff had to go through the
18 permit and find all the comments and whether or not they
19 were resolved or partially resolved. That discussion
20 would be in the record were it not for the procedural
21 irregularities. And the procedural irregularities, both
22 in suppressing the initial comment on the draft permit
23 and the procedural irregularities on writing comments,
24 that in no way referred to the EPA. And so this is
25 our -- this is the only document that is available in

1 this record to say what EPA perceived was resolved and
2 not resolved. And we're not saying -- we're not making
3 any claim in this case. This is only about the Pollution
4 Control Agency. Relators are not claiming or asking you
5 to decide was EPA right or wrong in letting this permit
6 go through. We're not asking you to determine whether
7 these issues were significant legally and correct
8 scientifically. We're just simply asking you to allow in
9 the record the analysis of what EPA's program staff
10 believe were resolved and not resolved, because MPCA --
11 because the irregularities didn't do that.

12 THE COURT: Okay. Mr. Pentelovitch and then
13 Mr. Schwartz, you can respond to everything.

14 MR. PENTELOVITCH: I just want to correct
15 something you said.

16 THE COURT: Okay.

17 MR. PENTELOVITCH: The MOA does not say that if
18 the EPA doesn't object it's approved. Here's what it
19 says. And I'm reading from Exhibit 328, Section 124.46,
20 Subd. 5. It's page 11 of the exhibit. It says, "If no
21 written comment is received by the Agency from the
22 Regional Administrator within the 15 days," and that
23 includes -- would include an objection -- "the Director
24 may assume" -- the PCA director or commissioner "may
25 assume, after verification of receipt of the proposed

1 permit, that the EPA has no objection to the issuance..."

2 So what the MOA provides is that the
3 commissioner of the PCA can assume there's no objection.
4 Doesn't say that there is no objection. It just says
5 there's an assumption.

6 And then if you go to --

7 THE COURT: Right. But that has the legal
8 force and effect of allowing that permit to be final,
9 which then would trigger the appeal rights of your
10 client.

11 MR. PENTELOVITCH: All true. But there's a
12 difference between saying that the EPA approves and the
13 EPA has not objected and assuming there's no objection.
14 I think the evidence here is there was no letter saying
15 there's no objection and no letter of approval. All
16 there is is an assumption that there's no objection. And
17 that section Subdivision 6 has similar language.

18 THE COURT: But it also means as a matter of
19 fact that the EPA has chosen not to reject the permit --

20 MR. PENTELOVITCH: It chose -- well --

21 THE COURT: -- which is their right.

22 MR. PENTELOVITCH: I'm not sure what it means
23 about the EPA other than the MPCA can make an assumption.
24 That's all the agreement says.

25 THE COURT: But the agreement also says that

1 they have to exercise their right to reject the permit
2 within so many days, doesn't it?

3 MR. PENTELOVITCH: It says -- that was in so
4 many days "they may comment upon, object to, or make
5 recommendations."

6 THE COURT: Okay. So if they don't reject
7 within those number of days, their right to object --
8 reject it is gone.

9 MR. PENTELOVITCH: That may be true, and they
10 can make an assumption, but it's not the same as saying
11 they have approved it, and it's not the same as saying
12 they didn't have an objection.

13 THE COURT: Okay.

14 MR. SCHWARTZ: Your Honor, just to go right to
15 this issue.

16 THE COURT: Yes.

17 MR. SCHWARTZ: Not only does the MOA give a
18 limited amount of time for EPA to object, but so does the
19 Clean Water Act Section 402(d)(2), which is 33 USC
20 Section 1342(d)(2), gives EPA 90 days to object to a
21 permit. And that time has long passed. So there's no
22 question that EPA cannot object to this permit.

23 MS. MACCABEE: Your Honor --

24 MR. SCHWARTZ: If I could finish.

25 THE COURT: Yes.

1 MR. SCHWARTZ: I've got three other points.

2 One is, what's in this memo is not the opinion
3 of the agency, very clearly. It's certainly not an
4 opinion that the permit should be rejected.

5 The second thing is, the fact that concerns of
6 the staff are not resolved is not only not a defect in
7 procedure, it's not even a justification for objection to
8 a permit.

9 And the third point is that if -- that this
10 memo was never proposed to be part of the administrative
11 record. In fact, it was never submitted to MPCA. MPCA
12 never saw it. So there is no way that this memo could
13 have been part of the administrative record because the
14 permit was issued -- already issued long before this memo
15 ever came to light.

16 THE COURT: No. Their argument is that this
17 memo documents things that should have been in the
18 administrative record before the permit was final and
19 that there's no other way of determining what those
20 things were without this memo. So you need to react to
21 that argument.

22 MR. SCHWARTZ: Yes. Your Honor, they had two
23 opportunities to document unresolved concerns. As a
24 result of the agreement that the Agency -- EPA reached
25 with MPCA, EPA got an extra 45-day period to comment on a

1 pre- --

2 THE COURT: You're not addressing the point.

3 MR. SCHWARTZ: No, I --

4 THE COURT: The point isn't whether the EPA
5 could have and didn't comment. The purpose of their
6 intended use of this exhibit is to document things that
7 could have or would have or should have been in the
8 administrative record before the permit was final but
9 wasn't in the administrative record because of efforts by
10 the MPCA to have the EPA's concerns stated orally and not
11 in writing.

12 MR. SCHWARTZ: Yes. And --

13 THE COURT: That is the -- and so the purpose
14 of this offer, as characterized by Relators, is that this
15 is the only way to document what those concerns were and
16 the importance of having those concerns addressed in the
17 permit.

18 MR. SCHWARTZ: Okay. What I'm trying to say is
19 there were two other ways they could have documented
20 their concerns if the agency itself had concerns. With
21 respect to the ability to review a permit and then
22 provide written comments, MPCA agreed, and this was a
23 written agreement, that EPA could file written comments
24 on the next draft of the permit. And that was the
25 trade-off. It was something that EPA wanted, that they

1 put in the agreement, and that MPCA agreed to, that EPA
2 could provide written comments on the next version of the
3 permit and was given an extra 45 days to review the
4 proposed permit, and they decided not to exercise their
5 right in writing to submit written comments. So if the
6 agency had wanted to do that, they had an express
7 agreement from MPCA that they could.

8 THE COURT: Why shouldn't I conclude from the
9 failure of the EPA to file any written comments that they
10 concluded that the final permit actually did address
11 their concerns as an agency versus the individual or
12 group of individuals who put that memo together?

13 MS. MACCABEE: Your Honor, Relators are not
14 really asking you to make any conclusions at all about
15 EPA. We're not asking you to conclude that they did
16 approve, did not approve, did write comments, should not
17 have wrote written comments. We're not even asking --
18 and this memo does not talk about whether they should or
19 should not object, and we're not asking the Court to
20 actually get into that issue at all. What we're asking
21 is that the Court allow us to provide documentation of
22 which issues were resolved and not resolved because there
23 is no other documentation. And that is really the
24 essence of the prejudice to Relators. This memo is a
25 catalog of the kind of information that would have and

1 should have been in the record had the irregular
2 procedures not occurred, and --

3 THE COURT: Well, isn't the letter that was
4 read on April 5, 2018 that documentation?

5 MS. MACCABEE: It is part of that
6 documentation, your Honor.

7 THE COURT: So what's missing that --

8 MS. MACCABEE: What's missing --

9 THE COURT: -- this memo --

10 MS. MACCABEE: I'm sorry.

11 THE COURT: -- that this December of 2018 memo
12 would provide? Aren't we talking about the same
13 concerns --

14 MS. MACCABEE: What we're missing --

15 THE COURT: -- at least some of the same
16 concerns?

17 MS. MACCABEE: Your Honor, you're precisely
18 right that we're talking about the same concerns. And
19 what this closing memo does, it says this was the
20 concerns, and these are how they were partially resolved,
21 entirely resolved, or not resolved. And that's the kind
22 of documentation that would have been in a normal set of
23 responses to comments like we looked at for those three
24 other mining permits, is here is what EPA said, and they
25 would have said here's what EPA said on March 15, here's

1 how MPCA believes it was resolved. Otherwise, I'm going
2 to tell you that the court of appeals has no way of
3 knowing anybody's opinion other than the non-expert
4 members of the public, myself included, what was or was
5 not resolved. And I'm going to tell you that Mr. Pierard
6 is not pretending that he went through every line of the
7 permit. They have technical staff who did that, as MPCA
8 usually has technical staff that say -- go through MPCA's
9 comments and say what was resolved and what wasn't.

10 THE COURT: How is what was resolved or not
11 resolved within the scope of this hearing?

12 MS. MACCABEE: There were two different issues,
13 sir. One is, the fact that this isn't the only document
14 is itself the evidence of what happened in the procedural
15 irregularities.

16 Second, the argument to the court of appeal in
17 the initial transfer motion in saying that it was --
18 reason is that there's substantial prejudice to Relators
19 as a result of these procedural irregularities. And so
20 if we have no way of saying things were still resolved at
21 the end other than our own efforts to try as non-experts
22 to analyze permits, we don't have a way of documenting to
23 the court of appeals and arguing to the court of appeals
24 that there was substantial prejudice. And once again,
25 your Honor, we're not asking you to evaluate whether

1 these issues are important, not important, whether we
2 were substantially prejudiced. We're just asking to have
3 a record so that the court of appeals can then consider
4 our arguments and decide from their perspective whether
5 we have shown that substantial prejudice.

6 THE COURT: Mr. Pentelovitch.

7 MR. PENTELOVITCH: I'm not sure I'm going to
8 say anything different, but I think I am.

9 The whole point here is this: There was a
10 chain reaction set off by the request by PCA that the EPA
11 not submit the letter that was already written. And had
12 that letter been submitted, it would be in the
13 administrative record, and there would be another
14 document in the administrative record similar to the ones
15 that had been put into evidence from other permits,
16 showing how the comments in the letter of the record had
17 been addressed. So there's an irregularity in that the
18 letter is not there and an irregularity that there's no
19 response. The exhibit that we're talking about -- and I
20 would respectfully suggest that there should at least be
21 questions of the witness so he can explain what the
22 document is before you make a decision whether it's
23 inadmissible so you fully -- there's a lot of assumptions
24 here about what he's going to say.

25 THE COURT: Right.

1 MR. PENTELOVITCH: But when you finally get
2 there, this document is the closest thing we have to what
3 the concerns were or how they were or weren't addressed
4 from the letter. And the point here is that this is
5 evidence that helps show the irregularity that the court
6 of appeals should have in the record before it when it
7 considers the more substantive arguments that you're not
8 considering. And the concept that this is a rogue actor
9 dissenting is, I think, going to be dispelled by the
10 evidence.

11 What this really is is this is a document that
12 helps establish one of the irregularities, in other
13 words, the missing response. MPCA never had to put in a
14 written response into the record responding to the
15 letter.

16 THE COURT: Right. But can't you -- don't you
17 already have that argument with the draft of the letter
18 that was read into the record on April 5? You can
19 already argue that that should have been part of the
20 administrative record. You can already argue that if it
21 had been, there would have been a requirement that the
22 permit contained the specific comments and that, because
23 those specific comments weren't in the permit, the
24 alleged procedural irregularities prevent the court of
25 appeals from determining whether those concerns were

1 addressed in the ultimate permit.

2 MR. PENTELOVITCH: But this exhibit -- you said
3 yesterday that you would admit things that had
4 substantive material in them if they helped to show
5 prejudice. And that's what this shows. It shows the
6 prejudice of not having the response by the MPCA in the
7 record because it shows that there were things that
8 weren't addressed. So this goes -- at least as far as
9 I'm concerned, it goes to prejudice.

10 MR. SCHWARTZ: Your Honor, it does --

11 THE COURT: Well, hold on.

12 MR. SCHWARTZ: Sorry.

13 THE COURT: Wait on your comments until all the
14 Relators have spoken so you can --

15 MR. SCHWARTZ: I'm sorry, your Honor.

16 THE COURT: -- do them all at once.

17 MR. SCHWARTZ: I get impatient.

18 THE COURT: I get that.

19 MS. RAY-HODGE: Your Honor, Vanessa Ray-Hodge
20 for the Band.

21 I just want to make the point that, yesterday,
22 Mr. Pierard testified in a series of questioning by
23 Ms. Maccabee that, generally, when EPA is allowed to
24 follow the process it normally follows, when comments are
25 received by the state agency, usually, EPA will send

1 another follow-up letter stating that the agency can move
2 forward. That wasn't done because EPA was asked not to
3 put anything in writing in this case. And to the extent
4 that the December 18 memo is trying to capture all of
5 those irregularities, and the fact that EPA was not able
6 to follow all of its regular procedures and act in
7 accordance with the way it had in other permitting
8 processes is relevant to our claims.

9 THE COURT: Well, the record only shows that
10 the EPA agreed to delay its written comments, so at some
11 future point. There is no evidence as of today that
12 there was ever an agreement between the PCA and the EPA
13 not or ever to provide a written comment. That's not in
14 the record.

15 MS. MACCABEE: Excuse me.

16 MS. RAY-HODGE: Well, and part of that, though,
17 is because some of this is outlined in the December 18
18 memo with respect to the procedures that EPA was and was
19 not allowed to follow as part of this process.

20 MS. MACCABEE: You're --

21 THE COURT: Well, you're misstating the record.
22 Not allowed to follow, that terminology you used is a
23 mischaracterization of the record. The record is that
24 EPA and MPCA entered into an agreement as to how EPA
25 comments would be made.

1 MS. MACCABEE: Your Honor, let's --

2 MS. RAY-HODGE: I apologize for the --

3 THE COURT: That is what the --

4 MS. RAY-HODGE: -- mischaracterization.

5 MS. MACCABEE: Your Honor --

6 THE COURT: -- record shows.

7 MS. MACCABEE: -- I'm going to just take us
8 back to what Mr. Pentelovitch was saying. And part of it
9 is you're right that the comment letter itself is an
10 important part of the record. But this is a 479-page
11 permit that was finally issued. And so if we come to the
12 court of appeals with a 479-page permit and then the
13 letter of March 2018, there's nothing in between to help
14 the Court figure out, well, was it all resolved in the
15 final permit or wasn't it. And that would usually be in
16 the record as a result of the responses to comments. And
17 that is the bridge that Mr. Pentelovitch is suggesting
18 needs to be in the record, not because we're asking you
19 to determine that EPA should or should not have objected
20 or anything else, but just simply that's the bridge that
21 is missing in this record uniquely because there was no
22 written comment made, and there were no responses to
23 comments that identified EPA's comments and then the
24 responses. And so that's the purpose that we're asking
25 that the Court submitted, and we are not going to argue

1 that there should have been an objection by EPA or the --
2 or even -- other than just to say this is the catalog of
3 what EPA program staff concluded so that then the court
4 of appeals can see, at least from your record, that there
5 was some information rather than asking the court of
6 appeals to take a 479-page permit and say was this in
7 there, was it not in there. And that's the problem that
8 we have before us without this document.

9 THE COURT: Any other attorneys for Relators?

10 MS. LARSON: I do have something different to
11 say. Elise Larson.

12 Ms. Maccabee hinted at this, but, your Honor,
13 the MPCA has also opened the door to having this memo in
14 the record. Their consistent defense to this entire
15 proceeding is that, at the end of the day, EPA's concerns
16 were resolved, and so what happened on April 5 didn't
17 prejudice us. What happened on April 5 was ultimately
18 resolved at some later period of time; but at the end of
19 the day, this permit resolved all of the concerns that
20 EPA had on April 5. They have said that to the public,
21 they've said that to this Court, they allude to it in
22 their pretrial briefing. And so --

23 THE COURT: But they have never argued that
24 100 percent of all of the employees of the EPA agreed
25 that all these issues have been resolved. They have only

1 said publicly that the EPA as an agency agreed that all
2 these issues were resolved, because the EPA as an agency
3 chose not to veto the permit. They also chose not to
4 file any written comments to the permit even under the
5 agreement that the EPA reached with the MPCA to delay
6 their written comments to a later date.

7 MS. LARSON: But I respectfully think that
8 those are two different things. The agency itself
9 choosing not to object on one hand and on the other hand
10 saying to the public all of the concerns from April 5
11 were resolved, which is what they consistently have said
12 to the public and to this Court, are two different
13 things. The agency choosing not to object is one
14 decision point that can be made. But another decision
15 point is, were all of the things on April 5 resolved in
16 the permit. And respectfully, that's been their defense
17 since this case got transferred to this Court. And in
18 your ruling yesterday, you said that when the agency
19 opens the door to that kind of information that we should
20 be able to allow -- we should be allowed to have that
21 information in the record to rebut their defense that the
22 issues from April 5 were mostly resolved by the agency,
23 which they have said over and over and over again.

24 THE COURT: Right. And how does -- the fact
25 that individuals not representing the final view of the

1 agency disagreed with what the agency did, how is that
2 relevant to the conclusion that the MPCA reached when it
3 made its public comment that the EPA chose not to comment
4 or veto the permit?

5 MS. LARSON: This memo does not show whether
6 the staff thought it was the right or wrong decision for
7 the agency itself to choose not to object. What it shows
8 is that some of the comments from April 5 were not
9 resolved. And MPCA has consistently said that the
10 majority of the comments from April 5 were resolved in
11 the final permit. And that's -- that is a different
12 inquiry than whether this -- because this memo doesn't
13 show, we, the staff people, think that the EPA should
14 have objected. It's simply documenting these are some
15 concerns that we raised that didn't end up getting
16 resolved in the permit. And those are two different
17 inquiries.

18 THE COURT: Okay.

19 MR. PENTELOVITCH: Your Honor, before he
20 responds, can I say one more thing?

21 THE COURT: Real quick.

22 MR. PENTELOVITCH: I disagree with something
23 you said. You said, as I understood what you said, that
24 the fact that the EPA didn't object means they thought
25 all the comments were resolved. I don't think that's

1 what -- all the MOA says is, if they don't object, you
2 can assume that -- if they don't respond, you can assume
3 there's no objection. The fact that there's no objection
4 doesn't mean all comments are resolved. That's a fact
5 issue that's unrelated to whether EPA objected or not.
6 And it's important to us because EPA theoretically
7 doesn't give a whit about our appeals to the court of
8 appeals and what our record is. We do care. And the
9 point is that these things -- there is evidence -- there
10 is evidence in this memo that certain issues raised in
11 the March letter are unresolved. And that's the point we
12 want to make in terms of the irregularity to go up to the
13 court of appeals.

14 THE COURT: Okay.

15 MR. SCHWARTZ: Your Honor, whether these
16 concerns were resolved is outside this proceeding,
17 because this proceeding is about procedural -- procedural
18 irregularities, not whether or not the staff was entirely
19 satisfied. And the transfer order and the Minnesota
20 Statute established the scope of this proceeding.

21 THE COURT: So how do they prove prejudice from
22 the procedural irregularities without evidence of this
23 sort?

24 MR. SCHWARTZ: Well, two things. The first
25 thing is, their problem is that since the alleged

1 procedural irregularities that occurred before, to which
2 this allegedly is -- memo is a bridge is really not a
3 bridge. And the reason is that anything that happened
4 before October 25, which is when the 45-day period for
5 written comments was initiated and lasted through
6 December 5, anything that happened before then was
7 essentially irrelevant, because on October 25, or any
8 time in that period, EPA could have put in the comment
9 letter, they could have put in concerns that were
10 unresolved, they could put in anything they want. And
11 that was an agreement between the agency and the -- and
12 MPCA.

13 THE COURT: So how does the -- how do the
14 Relators document prejudice from the agreement that was
15 made to delay written comments?

16 MR. SCHWARTZ: Well, the reason there's no
17 prejudice is because there was an agreement that the
18 agency could put in -- could say anything it wanted after
19 the public comment period ended. What they're
20 complaining about is that EPA decided to delay its
21 written comments until a later time. And we think there
22 were good reasons for this, and --

23 THE COURT: Right. But the Relators are also
24 complaining that if the written comments had been made
25 during the public comment period, then the final permit

1 would have required the MPCA to include a written
2 response to all those concerns so the court of appeals
3 would actually have something to review to make a
4 decision as to whether the agency substantively addressed
5 those concerns.

6 MR. SCHWARTZ: Well, that same situation would
7 have occurred if EPA had filed written comments on
8 October 25. Remember, the agency has to defend its
9 permit based on the administrative record. So had there
10 been EPA comments that were submitted during the time
11 when everybody agrees EPA could have submitted written
12 comments, those comments would have stood unrebutted
13 unless the agency put something into the administrative
14 record to justify a different decision from the one that
15 it actually made. And so the opportunity to -- well,
16 what they're saying is missing, which is a response to
17 the comments, would have had to have been made at the
18 agency's peril if it had not made it based on the
19 October 25 comments, whatever EPA submitted in writing.
20 Remember, the agency has to justify its permit.

21 THE COURT: Right. Well, and the Relators also
22 appear to be arguing that, even though the memo -- even
23 though the letter was read to MPCA staff on the phone,
24 that should have also been in the administrative record,
25 and therefore, the final permit still should have had the

1 written response.

2 MR. SCHWARTZ: And what I'm saying is that it
3 could have been in the administrative record. And had
4 the agency decided that it was important for that to
5 happen, then the PCA would have had to respond, or it
6 would not have been able to defend its permit. In other
7 words, it has to defend its action whenever EPA puts in
8 comments. EPA can comment, and the record -- and the
9 testimony today shows EPA has put in comments before the
10 public notice period, it's put in comments during the
11 public notice period, it's put in comments after the
12 public notice period. And whenever those comments come
13 in, the agency has to respond. And the reason it has to
14 respond is that if the comments are significant and it
15 doesn't respond, it can't defend its permit. The court
16 of appeals will overturn it.

17 THE COURT: Okay. Here's what's going to
18 happen next. You're going to give me the document, and
19 I'm going to review it during the break. I've heard your
20 arguments as to what I should do with the document when
21 you choose to offer it. Somehow, I think that's coming.
22 I'll let you lay a predicate for the admissibility of the
23 document with the witness without going into the contents
24 of the document. And then when you decide the magical
25 moment has come to offer it, offer it. If there's still

1 an objection, make it, but we're not going to have any
2 more arguments about it, and I'll make a ruling. So get
3 me the document, and we'll take a 15-minute break -- or a
4 20-minute break.

5 MS. MACCABEE: Thank you.

6 (Recess at 10:37 a.m. until 10:59 a.m.)

7 THE COURT: Remain seated. Let us embark on
8 the next step, which is foundation, Exhibit 525.

9 You may proceed.

10 MS. MACCABEE: Yes, your Honor.

11 BY MS. MACCABEE:

12 Q Mr. Pierard.

13 A Yes.

14 Q By December 2018, was it standard practice for
15 EPA Region 5 NPDES program to write a memo of any
16 outstanding issues when the permit process was
17 concluding?

18 A Yes.

19 Q How many years before that had you instituted
20 that practice?

21 A I would say probably four years.

22 Q And why did you institute the practice of
23 having a final memo written at the close of the NPDES
24 permit process?

25 A It was to wrap up that process, any outstanding

1 issues that maybe weren't fully resolved as a result of
2 our review in communications with the state. It was
3 documentation for the file. And the idea there was,
4 NPDES permits are issued for a five-year duration. They
5 expire after five years. It's very likely after five
6 years there's going to be a new permit writer at the
7 state. There will be a new permit writer at EPA --
8 permit review at EPA and probably new management. So the
9 memo to the file that kind of concludes our review of the
10 permit is a way of communicating to the next people that
11 are writing and reviewing the permit what we -- what we
12 were looking at at the time. So it would give them a
13 little bit more insight into what was going on five years
14 before, and they can have that knowledge going forward
15 into writing and reviewing the permit.

16 Q After your program had prepared a closing memo,
17 would it be available in EPA files?

18 A It would be in EPA files, yes.

19 Q So this wouldn't be a secret document, correct?

20 A No, no.

21 Q How many other times had your NPDES program
22 written a final memo of outstanding issues at the close
23 of a permit process?

24 A Probably a hundred or more times.

25 Q Now, at the end of the PolyMet permit process,

1 did your NPDES program also prepare a closing memo of
2 outstanding issues for the PolyMet project?

3 A Yes.

4 Q And can you describe how that document would
5 have been prepared, who would have done it, and what
6 would they have had to do?

7 A Well, the permitting staff prepares it with our
8 assigned attorneys.

9 Q And as compared to other times your program
10 staff had written a closing memo on a permit, was there
11 anything unusual about the steps that your staff had to
12 take to complete the PolyMet permit closing memo?

13 A Well, it -- you know, it's probably a little
14 bit more difficult because we didn't have MPCA's direct
15 response to our comments that we had read to them. So my
16 staff would have had to review the proposed final permit
17 and compare that to the comments that we had provided and
18 make that determination whether MPCA had responded to
19 those comments or not in some kind of change to the
20 permit.

21 Q Now, in the usual case of the hundred or so
22 closing memos, other than the PolyMet project, about how
23 long were those memos? How many pages?

24 A They varied in length. They were typically, I
25 would say, two to eight pages, something in that order.

1 Q And was the PolyMet NPDES permit closing memo
2 different in that respect?

3 A It was longer.

4 Q In your personal opinion, was the length and
5 number of issues that EPA's NPDES program included in the
6 PolyMet closing memo different because of the fact that
7 the EPA hadn't submitted a comment letter and MPCA hadn't
8 provided responses to comments?

9 MR. SCHWARTZ: Objection, leading.

10 THE COURT: Sustained.

11 BY MS. MACCABEE:

12 Q Was the length and number of issues in EPA's
13 NPDES closing memo for the PolyMet project any different
14 because of the fact that -- in your opinion, because of
15 the fact that there was neither a comment letter nor a
16 response to comments in the record?

17 MR. SCHWARTZ: Objection, leading.

18 THE COURT: Overruled.

19 THE WITNESS: If there had been a response to
20 our comments -- the December memo included items that had
21 been resolved by the MPCA revisions to the permit.
22 Typically, those resolved items would have been
23 identified in the response to comments, and they wouldn't
24 really have shown up in the closing memo. So that made
25 the memo a little bit longer.

1 BY MS. MACCABEE:

2 Q Was the PolyMet closing memo the only closing
3 memo in your program -- or do you know whether the
4 PolyMet closing memo was the only closing memo in your
5 NPDES program where the EPA had not submitted a comment
6 letter on either the pre-public notice or public notice
7 draft permit?

8 MR. SCHWARTZ: Objection. It's leading.

9 THE COURT: Overruled.

10 THE WITNESS: Could you repeat the question,
11 please?

12 MS. MACCABEE: Will you read it for me?

13 THE COURT REPORTER: "Was the PolyMet closing
14 memo the only closing memo in your program -- or do you
15 know whether the PolyMet closing memo was the only
16 closing memo in your NPDES program where the EPA had not
17 submitted a comment letter on either the pre-public
18 notice or public notice draft permit?"

19 THE COURT: So the question is do you know.

20 THE WITNESS: I couldn't say it was the only
21 one, no. I just am not sure. In most instances, we
22 comment on permits that we review. And if there's a
23 closing memo, it usually means there was an issue that
24 remained a concern and it maybe was partially or fully
25 unresolved. So I suspect the answer is no. When we do a

1 closing memo, EPA provided comments. But I can't say for
2 certain that that was always the case.

3 BY MS. MACCABEE:

4 Q So would it be more accurate to say that it was
5 unusual to have a closing memo where there was no EPA
6 comment letter on either the pre-public notice draft or
7 draft permit?

8 MR. SCHWARTZ: Objection, leading.

9 THE COURT: Sustained.

10 BY MS. MACCABEE:

11 Q I believe there was a little bit of confusion
12 in your question because the -- response to the question,
13 because I had asked was the PolyMet closing memo, to the
14 best of your knowledge, the only closing memo in your
15 program where EPA had not submitted a comment letter.
16 And I'm not sure whether your answer was yes or --
17 probably yes or probably no to that question.

18 MR. SCHWARTZ: Objection. This goes to EPA's
19 internal procedures, which are outside the scope of this
20 proceeding.

21 THE COURT: That's overruled. But the question
22 is repetitive, and it's been asked and answered. The
23 witness has already said he's not sure.

24 MS. MACCABEE: But then, your Honor, the
25 witness said at the end of the answer he thought was no.

1 And I think the way the question --

2 THE COURT: Then he said I can't be certain.
3 So his ultimate answer was he doesn't know. And the
4 witness' inability to say one way or another is not
5 license to reask the same question.

6 BY MS. MACCABEE:

7 Q Mr. Pierard, in most cases, when your program
8 wrote a closing memo, would there also be in the record a
9 written comment from EPA on the draft permit or public
10 notice draft permit?

11 A Yes.

12 Q Now let's turn to Exhibit 525. And that is the
13 December 18, 2018 closing memorandum for the PolyMet
14 NPDES permit.

15 MR. SCHWARTZ: Do you have a copy of that?

16 MS. MACCABEE: Here. Do you want --

17 MR. SCHWARTZ: Oh, I'm sorry. It's on the
18 screen here.

19 THE COURT: It's on the screen, at least the
20 first page is.

21 MR. SCHWARTZ: Yeah. We object to the
22 admission of this.

23 THE COURT: Remember, the process we're
24 following is that you make your objection at the time the
25 exhibit is offered. We already knew one would likely be

1 coming.

2 BY MS. MACCABEE:

3 Q Mr. Pierard, you have the document in front of
4 you?

5 A Yes.

6 Q Who prepared the December 18, 2018 memo in
7 Exhibit 525?

8 A My technical staff, my -- one of my supervisors
9 and regional counsel staff.

10 Q When you say your supervisors, who do you mean?
11 I mean, what is their role and their title? What do they
12 do?

13 A The title was section chief within the NPDES
14 Programs branch.

15 Q So how many people total were involved in
16 preparing this document?

17 A Five or six people probably.

18 Q Did you also view the document in Exhibit 525
19 on EPA's FOIA online website as a document released under
20 the Freedom of Information Act?

21 A Yes.

22 Q Does EPA's -- without saying specifically
23 what's in the document since it -- does EPA's closing
24 memo for the PolyMet NPDES permit provide your statements
25 during the permitting progress -- or I'm sorry --

1 contemporaneous with the permitting process of how it
2 came to be that EPA's comments on the draft PolyMet
3 permit weren't submitted and also your description of
4 other permitting events?

5 MR. SCHWARTZ: Objection, it's leading.

6 THE COURT: Sustained.

7 BY MS. MACCABEE:

8 Q Does EPA's closing memo on the PolyMet permit
9 provide your statements about EPA's comments on the draft
10 permit and other facts related to the permitting process?

11 MR. SCHWARTZ: Objection, it's leading.

12 THE COURT: Sustained.

13 BY MS. MACCABEE:

14 Q What does the closing memo of Exhibit 525 have
15 to say about the permitting process and the reason why
16 EPA's comments were not submitted?

17 MR. GRILLOT: Objection to the extent it calls
18 for testimony about the reasons why EPA did not submit
19 comments.

20 THE COURT: Sustained.

21 BY MS. MACCABEE:

22 Q Mr. Pierard, can you give an answer to the
23 question and talk -- and only reference the facts
24 documented in the memo without any of the reasons so that
25 we don't get into those issues that the Department of

1 Justice has objected to?

2 THE COURT: Why don't you do it this way.
3 Without revealing the contents of what you wrote, what's
4 the format of the letter, the cover letter, the format?
5 What are you doing?

6 THE WITNESS: The format, it's in the form of a
7 memo to the file.

8 THE COURT: And in outline form, what is the
9 memo addressing generally?

10 THE WITNESS: It's comparing the final proposed
11 permit to the comments that we provided to MPCA on the
12 public notice draft permit.

13 BY MS. MACCABEE:

14 Q And, Mr. Pierard, is there first a cover letter
15 and then an enclosure?

16 A There's a couple memos and an enclosure, yes.

17 Q And does the cover memo contain some facts
18 pertaining to the NPDES permitting process, without
19 getting into the facts themselves?

20 A Yes.

21 Q And then what is contained, just in a summary
22 fashion, in the chart enclosure that is attached to your
23 cover memo?

24 A That's a comparison of the comments that we
25 made in April and the provisions that were modified in

1 the proposed final permit and whether those revisions
2 partially or fully addressed our comments.

3 Q And, Mr. Pierard, speaking in general terms, if
4 a response to comments from MPCA had identified EPA's
5 comments in the customary way, would a similar reflection
6 of what was and was not resolved in the final permit be
7 provided in the responses to comments?

8 A Yes.

9 MS. MACCABEE: Your Honor, we offer into
10 evidence Exhibit 525.

11 MR. SCHWARTZ: Your Honor, we object.

12 THE COURT: Okay. I've had a chance to listen
13 to all of your arguments and read the document itself.
14 I'm the fact finder as well as the person who applies the
15 rules of evidence. So as with all court trials, I'm in
16 the unique position of having to read something that
17 somebody doesn't want me to read or consider, and then if
18 I allow it into evidence, I consider it, and if I exclude
19 it from evidence, then I'm not supposed to take it into
20 account in my final ruling. And we do that all the time.
21 So I trust myself to be able to do my job in that way.

22 Yesterday, in making my pretrial rulings, I
23 indicated that it would be beyond the scope of this
24 hearing for the Relators to bring in experts on the
25 nature of sulfide mining and copper-nickel mining to

1 testify as to the ways they believe the permit either is
2 inadequate or doesn't address concerns raised by the EPA
3 in the April 5 phone call. This document, Exhibit 525,
4 is really a written memorandum that's virtually identical
5 to the type of evidence that is proposed or was proposed
6 at the time of motions in limine and which the Court
7 indicated was beyond the scope of the hearing. So the
8 information in this memo appears to be beyond the scope
9 of the hearing for reasons stated at length by the Court
10 yesterday.

11 The date of the memo is the day before the
12 EPA's deadline for offering general objections to the
13 permit. The agency, the EPA as a whole, chose not to
14 file general objections. The memo suggests that if
15 general objections are filed, there would be time for
16 those objections to be addressed and negate the need for
17 specific objections to be filed. So this memo appears to
18 be either a last-minute lobbying effort to higher-ups in
19 the agency to issue a general objection letter or
20 document prior attempts to do the same that obviously
21 were not accepted by the agency. So this is
22 documentation of an internal agency process that was
23 ultimately not accepted by the agency.

24 So for all of those reasons, this memo is
25 irrelevant to the determinations that the Court needs to

1 make unless the Court decides that this is somehow
2 probative of prejudice to the Relators that can't be
3 demonstrated in any other way. And the Court does not
4 believe that is the case. The witness was asked whether
5 this closing memo would have been different in any way if
6 the April 5 comments that were read had been published
7 and therefore included in the administrative record
8 resulting in written comments by the MPCA as required by
9 law. The witness testified that the only difference was
10 the fact that resolved items wouldn't have had to have
11 been mentioned. Therefore, the Court is only left to
12 conclude that this closing memo wouldn't have been any
13 different than it was as it relates to unresolved items
14 had their concerns been published on or about -- well,
15 before the end of the public comment period in March of
16 2018.

17 So this memo isn't probative of any prejudice
18 to the Relators that isn't already available to Relators
19 with other documents and other evidence in the case; in
20 other words, the prejudice that the Relators wish to
21 demonstrate is already available to Relators. And to
22 that extent, this is cumulative, and the prejudice to the
23 MPCA and PolyMet outweighs any probative value on the
24 issue of prejudice in light of the other evidence of
25 prejudice available to Relators.

1 The Court further notes, and I think the
2 parties agree, that PCA never got this memo. It was
3 never intended to be in the Minnesota public record. It,
4 as I already mentioned, demonstrates a substantive
5 dispute over the merits of how the MPCA addressed oral
6 concerns raised by the EPA. This isn't probative of
7 prejudice to Relators because there's no basis to
8 conclude that the EPA's internal dispute over how to
9 handle MPCA's approach to these concerns would or would
10 not have been any different had the concerns been written
11 and in the record. And in fact, as I already mentioned,
12 based upon the witness' answers to questions put to him,
13 it would appear that the closing memo wouldn't have been
14 any different as it relates to items that weren't
15 resolved, which is the purpose for the Relators to offer
16 this document. So the document doesn't do what the
17 Relators claim it does do.

18 And as it relates to the substantive issues,
19 Relators still have at their disposal the same arguments
20 to the court of appeals that they would have had
21 otherwise, which is procedural irregularities earlier in
22 the process, prior to the publication or prior to the
23 approval of this final permit, prevented the development
24 of an administrative record sufficient to present review
25 to the court of appeals. That's all available to

1 Relators based upon earlier events.

2 So for those reasons, the objection is
3 sustained.

4 MS. MACCABEE: Your Honor.

5 THE COURT: Yes.

6 MS. MACCABEE: May I please make a record?

7 THE COURT: Yes. By the way, this document
8 will become part of Court Exhibit C, so it's -- it will
9 be treated as an offer of proof.

10 MS. MACCABEE: Your Honor, I just want to
11 briefly state for the record that we believe the
12 exclusion of this document for evidence is highly
13 prejudicial, that there is no other document in this
14 record that demonstrates which issues were and were not
15 resolved, and that there is ample documentation in this
16 record from MPCA's point of view that the issues that
17 were raised on April -- in the call on April 5 and that
18 were raised in the written comment on March 15 were
19 resolved. And so by excluding this evidence, your Honor
20 has prejudiced Relators in their ability to demonstrate
21 the significance and materiality of the procedural
22 irregularities both in suppressing the EPA's written
23 comments in not keeping a -- putting into the public
24 record the comments as they were read on April 5 and in
25 not providing responses to comments that identified EPA's

1 comments.

2 And I think if the -- I appreciate that the
3 Court's comments on the memo, I believe that had this
4 document been introduced, we would have been able to
5 further explain what was contained on the pages of that
6 document. And I believe that this is a decision that
7 really impairs Relators' ability to do the documentation
8 that the court of appeals asked for and the information
9 that's necessary to present our case at the court of
10 appeals.

11 THE COURT: The court of appeals, if it had
12 wanted to open up the record for a contested case hearing
13 that would include experts who would testify as to
14 whether the permit did or didn't address the concerns of
15 the EPA could have issued an order referring the matter
16 back for a contested case hearing under 14.67. They
17 didn't do that. And as I said yesterday, this hearing is
18 not about the substantive concerns of the Relators. And
19 I am not opening up this hearing process to air the
20 substantive concerns of Relators. At most, this document
21 represents a minority view of some people within the EPA
22 as to whether the concerns were or were not addressed.
23 And, frankly, that's not probative to the issue of
24 prejudice, that a minority view within the EPA is that
25 the concerns were or were not addressed. What's

1 probative to the issue of prejudice is whether there were
2 procedural irregularities that precluded the requirement
3 that these issues be in writing. It's apparent from the
4 witness' testimony that this memo would have been the
5 same as it relates to the alleged inadequate response to
6 their concerns, whether those concerns had been published
7 or not. That's what he said. He said the only thing
8 that would have been different -- or the only thing that
9 was different is that we added in all the things that
10 were resolved to the list of things that weren't
11 resolved. That's the only thing he said he did different
12 because these concerns weren't previously published.

13 So my ruling has been made. You can move on to
14 the next issue.

15 MR. PENTELOVITCH: Your Honor, if I can just
16 make a clarification.

17 THE COURT: Yes.

18 MR. PENTELOVITCH: You said two things. I just
19 want to be clear that I'm understanding what you're
20 saying.

21 THE COURT: Yes.

22 MR. PENTELOVITCH: You said that the document
23 is not probative of any prejudice that isn't already
24 available to Relators. And then you said it's
25 cumulative. So I take it what you meant from that is

1 that you believe that the evidence you're referring to
2 that's already available to Relators and cumulative are
3 already in the record. I just want to be clear, because
4 if you're making a ruling that it's cumulative, you're
5 ruling that it's -- whatever it is you're referencing is
6 already in the record. I just want to be clear that --

7 THE COURT: Right. The concerns of the EPA are
8 already in the record --

9 MR. PENTELOVITCH: Okay. So --

10 THE COURT: -- the fact that they had concerns
11 that aren't in the administrative record --

12 MR. PENTELOVITCH: Okay. Thank you.

13 THE COURT: -- and what those concerns were.

14 MR. PENTELOVITCH: Okay. And so you did mean
15 to say they were already in the record from your
16 perspective? That's --

17 THE COURT: Right. The fact that the EPA had
18 concerns about the permit and what those concerns were
19 and the fact that those concerns aren't in the
20 administrative record has already been established by you
21 in other ways and with other evidence.

22 MR. PENTELOVITCH: Thank you for the
23 clarification.

24 MS. MACCABEE: Your Honor, would you permit us
25 to make an offer of proof as to what the witness would

1 have said if we had been allowed to proceed?

2 THE COURT: Well, the document speaks for
3 itself, so what would there be to add?

4 MS. MACCABEE: Your Honor, I believe that there
5 are two different things that were perhaps stated
6 incompletely as to the extent and nature of unresolved
7 issues. And I also believe, as Mr. Pentelovitch was
8 highlighting and I think the witness testified, that this
9 was the only document that reflected what was resolved
10 and unresolved. And that is -- so in terms of this
11 document not being probative and being cumulative, there
12 is no other document at all in the record of any kind
13 which reflects anyone's analysis of whether issues were
14 and were not resolved. And the witness has testified to
15 that --

16 THE COURT: Right. I've already ruled that the
17 substantive debate over whether issues were or weren't
18 resolved is beyond the scope of this hearing.

19 MS. MACCABEE: So, your Honor, if
20 Respondents were to assert either that they perceived
21 that changes had been made to the permit that resolved
22 the issues or that EPA did not object, would those also
23 be beyond the scope of the hearing as going to the issue
24 of whether these comments were or were not resolved?
25 Because if that's the -- if the idea is that knowing

1 whether or not issues are and are not resolved is
2 irrelevant to this hearing, then a huge amount of the
3 evidence that has already been alluded to in the pretrial
4 briefs of the Respondents would also be completely
5 outside the scope of this hearing.

6 THE COURT: Right. And as I indicated
7 yesterday, the MPCA might open the door. But they
8 haven't opened the door because they haven't done
9 anything yet.

10 MS. MACCABEE: And, your Honor, this -- if the
11 MPCA opens the door --

12 THE COURT: You'll let me know.

13 MS. MACCABEE: My question is, if the MPCA
14 opens the door by asking about resolution of the issues
15 or asking that the -- about whether or not the EPA chose
16 not to veto any such thing, do we have another
17 opportunity to speak with Mr. Pierard, or are you saying
18 we'll simply put the document in the record?

19 THE COURT: You might. It depends on how the
20 door was opened and the persuasive force of your
21 arguments. But as it stands right now, the only apparent
22 purpose of offering this exhibit or Mr. Pierard's
23 testimony is to convert Mr. Pierard into a scientific
24 witness on behalf of Relators to address substantive
25 issues that are beyond the scope of the hearing. And

1 that's the only probative value that the Court sees this
2 exhibit having, except that probative value is beyond the
3 scope of the hearing, which makes it non-probative to
4 issues being presented at this hearing.

5 MS. MACCABEE: And, your Honor, Relators
6 understand that we would not -- we would not ask him
7 to -- Mr. Pierard to testify as to the legal or
8 scientific nature of these unresolved or resolved
9 concerns. What we would simply do is ask him to explain
10 whether there were more of these concerns that were not
11 addressed in either the responses to comments than there
12 are in other cases, and --

13 THE COURT: The inherent nature of his
14 articulation of the concerns are scientific in nature.
15 The document contains an attempt to make a case that the
16 way the MPCA chose to resolve the EPA's concerns weren't
17 adequate. And the cover letter makes that plain. And
18 the date of this memo is quite crucial to the Court's
19 ruling on the document, because at the time the document
20 was written, the EPA still could have issued a general
21 objection letter. So this is -- this is basically a
22 last -- arguably, or could have been one of the purposes
23 of the memo a last-ditch attempt internally at the EPA to
24 change somebody's mind. And the internal scientific
25 debate at the EPA as to whether the measures chosen by

1 the MPCA to address the EPA's concerns were or were not
2 adequate is irrelevant to the task before this Court, and
3 it won't be considered. I said that yesterday. I said
4 it today. And if the court of appeals had wanted me to
5 take evidence on the substantive merits of the concerns
6 raised by the EPA, then the referral wouldn't have been
7 to me under 14.68.

8 MS. MACCABEE: I understand, your Honor.

9 THE COURT: Okay.

10 Ms. Larson.

11 MS. LARSON: Your Honor, we would ask to make
12 an offer of proof. The MPCA has said consistently, has
13 raised as a defense consistently in this case that it
14 resolved all the concerns from the April 5 time period.
15 As Mr. Pierard is here, it would be the most efficient
16 use of time for us to be able to make an offer of proof
17 now as to that defense that has been raised by the PCA so
18 that this hearing could run more efficiently if they do
19 decide to raise that defense with the witnesses in their
20 case in chief.

21 MR. SCHWARTZ: Your Honor, the opening
22 paragraph in our pretrial brief said that all the
23 substance is irrelevant. And that's the way we feel.

24 THE COURT: I'm not going to change my ruling.
25 The door has not been opened. And if the door has been

1 opened or gets opened, or someone's nose peeks around
2 through a crack in the door, I'm sure that will be
3 brought to my attention by somebody.

4 MR. SCHWARTZ: Your Honor, just one last
5 observation, and that is, if this memo were let in and
6 the substance of the permit were put at issue, this would
7 be a different hearing.

8 THE COURT: I just said that.

9 MR. SCHWARTZ: I'm sorry. Thank you. I agree
10 with you, your Honor, which is not important, but I just
11 want to give you from our perspective. It would mean the
12 need to reduce a lot more evidence that we will not need
13 to reduce.

14 THE COURT: Right. That's fine. You didn't --
15 I appreciate your opinion. You didn't need to say it.
16 I'm not trying to curry anyone's favor. I'm trying to
17 follow the law and the directions that the court of
18 appeals gave me. That's it. Okay?

19 Let's go on.

20 BY MS. MACCABEE:

21 Q If we could turn to --

22 MR. BELL: Your Honor, before we proceed, may I
23 just take one minute on behalf of the witness --

24 (Reporter clarification.)

25 THE COURT: Say your name.

1 MR. BELL: My name is Kevin Bell, K-e-v-i-n,
2 B-e-l-l, personal counsel for Mr. Pierard.

3 THE COURT: Yes.

4 MR. BELL: It's just that he has already been
5 here for a second day beyond that which he had originally
6 anticipated lasting. We have an hour left before lunch
7 and three hours this afternoon, after which time the
8 subpoena for his testimony is due to expire, which, while
9 I understand the Court can reissue it, he has already
10 been here of great personal hardship, and we would just
11 request that the parties in the room try and, I guess,
12 keep things moving expeditiously.

13 Also, I'll just note that the microphone in the
14 courtroom is very sensitive, so we've been picking up a
15 bit of cross-talk, just so people know.

16 THE COURT: All right. Yeah, and we have lots
17 of microphones around, too, so there's plenty of
18 electromagnetic energy in the room.

19 All right. Good advice, Mr. Bell. I should
20 have called you Judge Bell. I think it's good advice to
21 move things along.

22 We're probably behind where even you wanted to
23 be, Ms. Maccabee.

24 MS. MACCABEE: Yes, your Honor.

25 BY MS. MACCABEE:

1 Q Let's turn to Exhibit 600.

2 MR. SCHWARTZ: Your Honor, we would like to see
3 the document.

4 We objected to the foundation.

5 THE COURT: This is a document, the subject of
6 a previous foundation objection?

7 MR. SCHWARTZ: Yes.

8 MS. MCGHEE: Your Honor, this is Davida McGhee
9 for PolyMet.

10 We also objected previously.

11 THE COURT: Okay. Just a second. And you
12 object to the foundation of the document?

13 MS. MCGHEE: That's right, your Honor.

14 THE COURT: Okay. Just a second.

15 This looks like a press release issued by the
16 PCA.

17 MR. SCHWARTZ: Yes. The email that transmitted
18 it is an internal EPA email.

19 THE COURT: So what are you objecting to?
20 You're objecting to the four words "note the highlighted
21 text"?

22 MR. SCHWARTZ: We got this very recently. We
23 didn't want it to be admitted before we had a chance to
24 look at it. We will withdraw our objection.

25 THE COURT: PolyMet?

1 MS. MCGHEE: We'll withdraw.

2 THE COURT: All right. So I've brokered peace.
3 The exhibit is received.

4 BY MS. MACCABEE:

5 Q Mr. Pierard, can you see on this -- first of
6 all, this document is a press release. Can you tell me
7 at what time this press release was issued? I don't have
8 it in front of me, otherwise I would be reading it
9 myself.

10 THE COURT: December 20, 2018 is the date of
11 the email transmission.

12 BY MS. MACCABEE:

13 Q So, Mr. Pierard, this is a December 20, 2018
14 press release on the issuance of the PolyMet permit. And
15 if you can look at the sentence, "The EPA had no comments
16 during the period allotted." Do you consider this to be
17 an accurate statement about EPA's comments on the draft
18 PolyMet permit?

19 A Well, it's not clear to me what the "period
20 allotted" means. You know, we had provided comments. We
21 provided comments to PCA after the close of the public
22 comment period, and we had verbally been discussing those
23 for many months after that.

24 Q And did you also read to MPCA on March -- your
25 March 15, 2018 comment letter on April 5, 2018?

1 A Yes.

2 Q And do you consider that to be providing
3 comments?

4 A Yes. Yes, I do.

5 Q In your experience at EPA, other than for the
6 PolyMet permit, are you aware of any other time that MPCA
7 asked that EPA's comment on the draft NPDES permit not be
8 sent?

9 MR. SCHWARTZ: I think this has been asked and
10 answered.

11 THE COURT: Asked and answered. Sustained.

12 THE WITNESS: We did that yesterday.

13 BY MS. MACCABEE:

14 Q In your experience at EPA, was there any other
15 time other than the PolyMet case where EPA asked MPCA for
16 a pre-public notice draft permit with sufficient time to
17 comment and MPCA did not do so?

18 MR. SCHWARTZ: I think that was asked and
19 answered, too.

20 MS. MACCABEE: Pardon?

21 THE COURT: It's been asked and answered.
22 Sustained.

23 MS. MACCABEE: I don't believe it has,
24 your Honor. I don't believe that question was asked.

25 THE COURT: My recollection is that it was.

1 BY MS. MACCABEE:

2 Q Was it unusual for MPCA to fail to provide a
3 pre-public notice draft of a permit with sufficient time
4 to comment when asked to do so by EPA?

5 A Yeah, it was unusual, but they would reject
6 that request.

7 Q In your experience at EPA, other than the
8 PolyMet permit, was there ever -- was there any time when
9 you participated in the development of an EPA written
10 comment on a draft NPDES permit and that comment was not
11 sent to the state proposing to issue the permit?

12 MR. SCHWARTZ: I believe that was asked and
13 answered as well.

14 THE COURT: Sustained.

15 MS. MACCABEE: Your Honor, I'm not sure that
16 question was asked either, sir.

17 THE COURT: It's my recollection that it was.

18 BY MS. MACCABEE:

19 Q In your experience at EPA --

20 THE COURT: I remember his answer, too. It was
21 one that I think you would like.

22 MS. MACCABEE: Yes, sir.

23 BY MS. MACCABEE:

24 Q In your experience at EPA, other than for the
25 PolyMet permit, was there ever another time when you had

1 to read an EPA comment letter to MPCA over the phone in
2 order for permitting staff to learn what EPA's comments
3 on a draft permit would have said?

4 MR. SCHWARTZ: Objection, asked and answered.

5 THE COURT: I'll overrule that.

6 THE WITNESS: There was never another time
7 where I was -- I had to read our comments to MPCA staff
8 on a permit.

9 BY MS. MACCABEE:

10 Q And does that include other states as well as
11 the MPCA?

12 A Yes.

13 Q You testified yesterday that in March 2018 you
14 were personally aware of phone calls and at least one
15 email from MPCA asking that EPA not send its written
16 comments on the draft PolyMet NPDES permit. Either in
17 March 2018 or at any time since, have you become aware
18 that any other person or entity other than PCA had asked
19 that EPA not send EPA's comments on the draft PolyMet
20 permit?

21 MR. SCHWARTZ: Objection. I think that was
22 asked and answered.

23 THE COURT: Not as worded here. Overruled.

24 THE WITNESS: I only know that MPCA asked us
25 not to send comments. No one else asked us not to, not

1 that I'm aware of.

2 MS. MACCABEE: No further questions, your
3 Honor.

4 THE COURT: Cross-exam?

5 MR. SCHWARTZ: Yes.

6 THE COURT: Mr. Pierard, are you able to see
7 the attorney at the podium from where you are? He's
8 waving.

9 THE WITNESS: Yes, I can see him. Yes.

10 THE COURT: Okay. Then we're good.

11 CROSS-EXAMINATION

12 BY MR. SCHWARTZ:

13 Q All right. Mr. Pierard, my name is
14 Richard Schwartz, and I'm representing the Minnesota
15 Pollution Control Agency. And I have some questions for
16 you as a follow-up to the direct examination you received
17 from Ms. Maccabee.

18 Yesterday you told us about some calls you had
19 with Ms. Lotthammer about whether EPA should submit
20 comments on the PolyMet NPDES permit during the comment
21 period. Do you recall that?

22 A Yes.

23 Q So I want to start out with some questions for
24 you about what she said to you. First, she wasn't
25 questioning EPA's authority to submit written comments,

1 was she?

2 A No.

3 Q And she never said that EPA lacked authority to
4 submit written comments during the public comment period?

5 MS. MACCABEE: Objection, duplicative.

6 THE COURT: Overruled.

7 THE WITNESS: Would you ask that question
8 again?

9 BY MR. SCHWARTZ:

10 Q Yes. My question was more specific, and that
11 is whether she told you that EPA or suggested to you that
12 EPA lacked authority to submit written comments during
13 the public comment period for a permit.

14 A She -- what she said was that we should not
15 submit comments along with everyone else.

16 Q Did she say you lacked authority to do that?

17 A No, I don't believe she did. There was some
18 question at that time about the MOA and a suggestion that
19 maybe we were violating the MOA by considering sending
20 comments during the comment period.

21 Q Did she suggest that you were violating the
22 MOA?

23 A I don't believe she ever did, no.

24 Q In fact, wasn't her request to you about the
25 timing of EPA's written comments?

1 A Well, her request -- I mean, it was more than
2 just that. It was more than just about timing. It was
3 the impact EPA's comments would have and their conjecture
4 that others would have the same comments as EPA --

5 Q But in any event --

6 A -- so --

7 Q I'm sorry. Go ahead.

8 A Yeah. So her suggestion was why don't you
9 wait, because her feeling was that many of our comments
10 would be very similar to other comments that were
11 received.

12 Q Now, did she say to you that it would be
13 inefficient for EPA to submit written comments on a
14 permit that MPCA already knew it was going to change?

15 A Yes.

16 Q Now, during your conversations with
17 Ms. Lotthammer, did you express concern about the 15-day
18 deadline in the memorandum of agreement?

19 A Yes.

20 Q And in response, didn't she offer to expand the
21 15-day timeline in the memorandum of agreement for
22 written comments?

23 A Yes.

24 Q Now, I would like you to turn to Exhibit 54,
25 which, hopefully, we have a copy of for you there.

1 THE COURT: Is that an exhibit from yesterday
2 or a new one?

3 MR. SCHWARTZ: It's probably one from yesterday
4 under a different number, I'm afraid. Number 64.

5 THE COURT: Okay. That was not received
6 yesterday.

7 BY MR. SCHWARTZ:

8 Q And that should be an email chain between
9 Mr. Thiede and Ms. Lotthammer.

10 A Yes.

11 THE COURT: There being no objection, it's
12 received.

13 MS. MACCABEE: I haven't seen it, your Honor.
14 Sorry. It's up there. I believe that was
15 Exhibit 307. Exhibit 307 had comments on the top.

16 THE COURT: So I take it there's no objection?

17 MS. MACCABEE: No, sir.

18 THE COURT: All right.

19 BY MR. SCHWARTZ:

20 Q This is an email between Mr. Thiede and
21 Ms. Lotthammer. And Mr. Thiede recounts his
22 understanding of the agreement that MPCA and EPA reached.
23 I want to give you enough time to look at that. You'll
24 see Mr. Thiede's characterization of what the agreement
25 consisted of, and that should appear on the top of the

1 second page, I believe. And so I ask you, didn't EPA and
2 MPCA agree that MPCA would prepare and submit to EPA a
3 revised draft of the PolyMet permit?

4 A Yes.

5 Q And --

6 A After the public comment period, the agreement
7 outlined here was that MPCA would provide us with what
8 you refer to as a pre-proposed permit, which is a draft
9 permit for EPA review.

10 Q And didn't EPA and MPCA agree that MPCA would
11 give EPA 45 days to review the pre-proposed permit and
12 also review MPCA's responses to public comments?

13 A (Nods head.)

14 Q Could you just answer verbally?

15 A Yes.

16 Q Or --

17 MS. MACCABEE: Objection --

18 THE WITNESS: Yes.

19 MS. MACCABEE: -- compound question.

20 THE COURT: Overruled.

21 THE WITNESS: There was -- what this agreement
22 was for was to provide us with a pre-proposed permit, a
23 draft permit, and their response to comments. And as I
24 recall, they provided us with the pre-proposed permit.
25 And shortly thereafter, they provided a response to

1 comments, if I remember correctly.

2 BY MR. SCHWARTZ:

3 Q And didn't MPCA and EPA agree that, during the
4 45-day review period, EPA would have the right to provide
5 written comments to MPCA?

6 A Yes.

7 Q And in addition to the new 45-day period,
8 didn't the agreement provide that EPA still would retain
9 a 15-day comment period provided in the memorandum of
10 agreement?

11 A Yes. This was -- that was worked out --
12 Shannon had originally proposed to give us more time, and
13 the 15-day was to review the proposed permit. We
14 determined that there was no avenue for allowing us
15 additional time. We couldn't modify the MOA to do such a
16 thing. So this was the alternative that we came up with.

17 Q And so this period preceded the 15-day period.
18 Is that right?

19 A Yes.

20 Q And looking at Exhibit 54, did MPCA concur with
21 EPA's characterization of the agreement? You'll find it
22 at the top of the email chain.

23 A Yes.

24 Q Next, I would like you to look at Exhibit 674.
25 And can you describe what that exhibit has in it?

1 THE COURT: There being no objection, it's
2 received.

3 THE WITNESS: It's an email message from me to
4 Ken Westlake. Ken Westlake is the manager of our NEPA
5 group --

6 (Reporter clarification.)

7 THE COURT: I'm sorry, what group?

8 THE WITNESS: NEPA, the National Environmental
9 Policy -- a different group that --

10 THE COURT: So just give us -- what's the
11 acronym?

12 THE WITNESS: N-E-P-A.

13 THE COURT: N-E-P-A, okay.

14 THE WITNESS: Yeah. His group handles the
15 environmental impact statements and things like that. He
16 was involved early in the process when they were doing an
17 environmental impact statement for the PolyMet project,
18 so he had an interest in what was going on with the site.
19 So --

20 BY MR. SCHWARTZ:

21 Q And in that -- I'm sorry.

22 A -- this was --

23 Q Go ahead.

24 A So just to get back to it. This is an email.
25 He had asked me a question if EPA ever sent a comment

1 letter to PCA on the draft PolyMet permit. In my email
2 back to him, I said, you know, MPCA agreed to give us a
3 revised draft based on comments received during the
4 comment period.

5 Q And can you continue with your response?

6 A It goes on to say, EPA has 45 days to provide a
7 written comment on that draft.

8 Q Okay. Next, I would like you to look at
9 Exhibit 2014. This is an email from Barbara Wester.

10 A Yes.

11 Q Could you just describe what this email was
12 about?

13 THE COURT: There being no objection, it's
14 received. And it's dated September 19, 2018, or at least
15 that's the last date in the chain.

16 THE WITNESS: Right. It's an email from
17 Barbara Wester to myself and some of my staff.

18 BY MR. SCHWARTZ:

19 Q From looking at the email, do you remember why
20 she sent it?

21 A To -- it appears we were going to have a
22 meeting with MPCA the following week, and she wanted --
23 she was suggesting that we remind everyone at that
24 meeting that we had made this agreement.

25 Q Okay. And the agreement included the 45-day

1 additional period for EPA to provide the comments?

2 A Yes.

3 Q Next I would like you to look at -- I would
4 like to turn to the April 5 call that we've been
5 discussing where EPA read written comments to MPCA. And
6 in connection with that call, I would like you to look at
7 Exhibit 2010.

8 THE COURT: Hearing no objection, it's
9 received.

10 BY MR. SCHWARTZ:

11 Q And what I would like you to do is, just to
12 save time, look -- or first, describe who the email was
13 from and to and its date. I'm going to ask you about the
14 sentences at the very bottom.

15 A Okay. Yeah. You asked me to describe this
16 memo. Apparently, there was a suggestion that a regional
17 administrator had received that EPA had intended to
18 object to the permit. So I needed to respond to that.
19 Linda Holst at the time -- my response was to
20 Linda Holst. And she, I believe by that time, was the
21 acting Water director, so she was my immediate
22 supervisor. And what I was saying here was we hadn't
23 given any signal to anyone, we in the program, the NPDES
24 program that I managed, that we had intended to object.
25 I contacted Jeff Udd, who was my counterpart at MPCA, to

1 try and run this down to figure out is this something
2 that he had heard, that we had intended to object. And
3 he indicated here -- he indicated to me that he had not
4 heard that, that we intended to object. So I was trying
5 to put that rumor to bed so that Linda could get back to
6 Cathy that if that rumor was out there, it didn't come
7 from the program at EPA.

8 Q And then near the bottom of the email, you
9 describe what you accomplished by reading your draft
10 comment letter to MPCA. The sentence starts at the left,
11 "After the end of the public comment period we provided,
12 essentially by reading our draft comment letter, to MPCA
13 during a conference call to insure that they fully
14 understood our questions and concerns with the draft
15 permit to enable them to address these to the extent
16 possible as they develop the pre-proposed permit."

17 Do you see that?

18 A Yes.

19 Q And so the purpose then was to convey your
20 concerns to MPCA. And based on this letter, do you
21 believe that you did that?

22 A Well, I read our letter to them, and if they
23 took good notes, I would say they -- we accomplished that
24 mission.

25 Q All right. Now, on October 25, didn't MPCA

1 send its pre-proposed permit to EPA, and you received it?

2 A Yes, I believe -- I believe that was the date.

3 Q Yeah. And the comment deadline then would have
4 been December 9, if you add 45 days to October 5?

5 A Yes.

6 Q And then towards the end of that comment
7 period, I calculate -- on December 3, which I calculate
8 as being 39 days, did you make a call to Mr. Udd
9 concerning the pre-proposed permit?

10 A I believe I did around that time. I don't know
11 the exact date.

12 Q Yeah. So what did you say to Mr. Udd?

13 A My recollection to that would have been that I
14 told him to proceed to the proposed permit stage.

15 Q And on that call, did you express any
16 reservations or objections to the pre-proposed permit
17 terms?

18 A I don't know.

19 Q So then the next day, on December 4, MPCA sent
20 you the proposed final permit. Is that correct? And
21 that's the --

22 A Again, exact date I don't have. It would have
23 been around that, yes.

24 Q Yeah. And was that the action that triggered
25 the 15-day comment period?

1 A Yes.

2 Q And so that was the one that triggered the
3 comment period under the MOA?

4 A Yes.

5 THE COURT: We're going to break for lunch.
6 We'll resume at 1:30. Thank you.

7 (Lunch recess was taken at 12:08 p.m. until 1:40 p.m.)

8 * * * * *

9 A F T E R N O O N S E S S I O N

10 * * * * *

11 THE COURT: Remain seated.

12 Are we ready to proceed?

13 MR. SCHWARTZ: Yes.

14 THE COURT: Okay. Then let's proceed.

15 BY MR. SCHWARTZ:

16 Q All right. Mr. Pierard, I have a few questions
17 for you about the memorandum of agreement, which, if you
18 want to consult it, is an attachment to Exhibit 1054.
19 The cover is the email that contains Ms. Lotthammer's
20 request to EPA, and then behind it is a copy of the
21 memorandum of agreement.

22 THE COURT: All right. Is 1054 in evidence?

23 MR. SCHWARTZ: I believe so.

24 MS. MACCABEE: Your Honor, it appears 1054 is
25 identical to Exhibit 333, but until we actually confirm

1 every detail, I was going to suggest that we just
2 proceed.

3 BY MR. SCHWARTZ:

4 Q So I just have a few questions, and the first
5 one is whether the MOA restricts when EPA may comment
6 upon a --

7 THE COURT: Hold on. Hold on.

8 MR. SCHWARTZ: I'm sorry.

9 THE COURT: It appears that the only difference
10 between Exhibit 1054 and Exhibit 333 is that one is
11 copied on one side, and the other is copied on two sides.
12 That's all I can tell is the difference. Unless anyone
13 objects, we're going to reference 333, and we don't need
14 1054 if everyone agrees they are identical. I do not
15 want to clutter the record with lots of identical
16 exhibits. And the fact that 333 is a two-sided copy, the
17 Appellate Court will have to live with it. All right?
18 Anyone opposed? Okay. So referring to Exhibit 333.

19 BY MR. SCHWARTZ:

20 Q So the first question is whether EPA under the
21 MOA may comment before the public comment period.

22 A There is nothing in the MOA that speaks to
23 that, at least as far as I recall.

24 Q And the second and a related question, does the
25 MOA allow EPA to comment during the public comment

1 period?

2 A Again, the only thing during the public comment
3 period, the MOA says -- as I recall, the MOA says that
4 MPCA must provide a copy of the permit at the beginning
5 of the public comment period to EPA. But beyond that,
6 it's silent about what EPA does with that.

7 Q And as you interpret it then, the silence means
8 that EPA may comment during the public comment period?

9 MR. BELL: I'll object to the extent it calls
10 for a legal conclusion.

11 THE COURT: Rephrase the question.

12 BY MR. SCHWARTZ:

13 Q Mr. Pierard, based on your working knowledge
14 and past experience with the MOA, does it prevent EPA
15 from commenting during the public comment period?

16 A No, I don't believe it does.

17 Q I have a similar question for the period after
18 the public comment period. Is there anything in the MOA
19 that precludes EPA from commenting on a permit after the
20 public comment period?

21 A No. It's silent on that.

22 Q The next question is, is there anything in the
23 MOA that empowers MPCA to prevent EPA from submitting
24 written comments on a pre-final permit? By that I mean a
25 permit at any stage.

1 MS. MACCABEE: Your Honor.

2 THE COURT: Yes.

3 MS. MACCABEE: Objection to the term "pre-final
4 comment." It's confusing because we've used the terms
5 "pre-proposed final permit, proposed final permit," and
6 there's a distinction that is being obfuscated with that
7 question.

8 BY MR. SCHWARTZ:

9 Q I will rephrase the question.

10 Is there anything in the MOA that empowers MPCA
11 to prevent EPA from commenting on a permit in writing at
12 any time?

13 A No, not that I'm aware of.

14 Q I want to go now beyond the MOA and ask whether
15 you have knowledge of any other permit where -- any other
16 NPDES permit where EPA has been given a 45-day period for
17 written comments on a pre-proposed permit?

18 THE COURT: Is --

19 MS. MACCABEE: Objection.

20 THE COURT: -- that the same terminology?

21 MS. MACCABEE: Objection. Objection.

22 THE COURT: Hold on.

23 MR. SCHWARTZ: I'm sorry, your Honor. I'll --

24 THE COURT: We've got sound problems, but -- go
25 ahead.

1 MR. SCHWARTZ: Yeah, I'll rephrase.

2 MS. MACCABEE: Objection.

3 THE COURT: The question has been withdrawn.
4 You can rephrase.

5 MR. SCHWARTZ: Yeah, I'll withdraw.

6 THE COURT: We have sound issues, and it looks
7 like the sound issues are on the end of the witness.

8 MR. BELL: Can you describe the issue?

9 THE COURT: We're getting an echo back.
10 It suddenly stopped. Okay.

11 MR. BELL: I'll try turning down the display
12 volume.

13 THE WITNESS: Is your phone on?

14 THE COURT: Okay. Let's -- so far so good.
15 We'll start with a --

16 THE WITNESS: Is it good now?

17 THE COURT: Yes. Fresh question.

18 BY MR. SCHWARTZ:

19 Q Okay. Based on your experience at EPA, are you
20 aware of any other permit in the development process
21 where EPA has been given a 45-day period for written
22 comments?

23 MS. MACCABEE: Objection, vague.

24 THE COURT: Sustained. I don't know what
25 pre-development [sic] means.

1 MR. SCHWARTZ: Okay. I'll try again.

2 BY MR. SCHWARTZ:

3 Q I'm asking you about the period between a
4 permit application and the issuance of a -- or EPA's
5 approval of a final permit. Any time during that period,
6 are you aware of any other permit where EPA has been
7 given a 45-day period for written comments on a
8 pre-proposed permit?

9 MS. MACCABEE: Your Honor, he's using the word
10 "pre-proposed permit," which the witness has already
11 explained is confusing because there's a proposed --

12 THE COURT: Just state your objection.

13 MS. MACCABEE: Yes, sir.

14 THE COURT: The objection is sustained. That
15 is a problematic term that you should avoid.

16 MR. SCHWARTZ: Yeah. I'm trying to avoid it,
17 your Honor. I'm not doing very well. But let me try --

18 THE COURT: You seem to be locked in with
19 muscle memory --

20 MR. SCHWARTZ: Yes.

21 THE COURT: -- so you need to unlock.

22 BY MR. SCHWARTZ:

23 Q Okay. Are you aware of any other NPDES permit
24 where MPCA has provided EPA with a 45-day period to
25 provide written comments?

1 MS. MACCABEE: Objection. It assumes facts in
2 evidence [sic], because I don't see that there's any
3 evidence at all that MPCA has given EPA anything. If
4 he's talking about the memorandum of agreement between
5 the two parties, then he can refer to the part of the
6 memorandum of agreement he's talking about.

7 THE COURT: I'm going to sustain the objection
8 because it assumes facts not in evidence because there's
9 no evidence that MPCA provided EPA with a 45-day period.

10 BY MR. SCHWARTZ:

11 Q All right. I'll try, hopefully, one last time.

12 Are you aware of any other permit where EPA has
13 had a 45-day period for written comments on the permit?

14 MS. MACCABEE: Objection, vagueness.

15 THE COURT: Overruled -- actually, sustained.
16 Hold on. Actually, sustained as to time. At what point
17 in the process?

18 BY MR. SCHWARTZ:

19 Q Okay. I'll try, hopefully, one last time.

20 For the period between the permit application
21 and EPA's decision on the permit, are you aware of any
22 other permit where EPA has had a 45-day period for
23 written comments?

24 MS. MACCABEE: Your Honor, objection,
25 vagueness.

1 THE COURT: Overruled.

2 THE WITNESS: My perspective is that EPA can
3 comment on any permit at any time during that process.
4 There is no 45 days. There is no limitation on this.
5 The only time frame during the permit process is the
6 public notice process and then when you finally get to
7 the proposed permit stage, the time frames that are
8 specified either in the MOA or in the regulations. Other
9 than that, EPA, I believe, is free to comment at any
10 time.

11 BY MR. PENTELOVITCH:

12 Q All right. Now I would like you to turn to
13 Exhibit 370, which you have already answered some
14 questions about. And that involves an email exchange
15 between you and Ann Foss.

16 THE COURT: That has not been offered before
17 unless it's been given a different number.

18 MR. SCHWARTZ: It may have been.

19 MS. MACCABEE: Your Honor, this is the first
20 three pages of Exhibit 685, and we would not object to
21 him putting it in as a new exhibit for that reason.

22 THE COURT: All right. Exhibit 370 is
23 received.

24 BY MR. SCHWARTZ:

25 Q Do you recall discussing this email exchange

1 yesterday?

2 A Yes.

3 Q And what I would like to do is take you through
4 it with a little more precise focus on the language used
5 in this email exchange. If you look at the second page,
6 and the first email from you, which says, "Hi, Ann,"
7 you're talking about certain decisions concerning NPDES
8 just -- NPDES permitting summarized in writing to assure
9 shared understanding of the issues and documentation of
10 decisions and approaches. Is that right?

11 A Generally, I believe that's right.

12 Q And then if we go to the first page, which is
13 the one in which Ann Foss responds to your email, look
14 through and just confirm with me some of the things she
15 says. She refers to the fact that, "It has been quite
16 some time since we have had conversations, 6 to 12
17 months."

18 And the "we" refers to you and Ann Foss. Is
19 that correct?

20 A No, no. The "we" would refer to our teams, the
21 EPA team and the PCA team.

22 Q Okay. And then she says a little further down
23 that if you had conveyed the need for such discussions,
24 she would have suggested a meeting or a conference call
25 to refresh everyone's memory on previous discussions. Do

1 you see that?

2 A Yes.

3 Q Is that correct?

4 A Yes.

5 Q Is the interpretation --

6 A Yes, that's what it -- that's what it says,
7 yes.

8 Q Then she says that some of these discussions
9 were several years ago. Am I interpreting that right?

10 MS. MACCABEE: Excuse me, your Honor. I don't
11 believe we're talking about interpretation.

12 THE WITNESS: That's what the email says.

13 BY MR. SCHWARTZ:

14 Q Okay. Then she says, "right now" -- and I just
15 want to direct your attention to this -- "it is too early
16 to start the permitting process," but she suggests that
17 you "start a list of issues that would be worked through
18 during permitting."

19 A Okay.

20 Q And she recommends, does she not, that this
21 list would be documented and saved?

22 MS. MACCABEE: Your Honor, that's not what the
23 document says.

24 THE COURT: What's your objection?

25 MS. MACCABEE: Objection, assumes facts not in

1 evidence.

2 BY MR. SCHWARTZ:

3 Q All right. Let me quote from the letter -- or
4 rather from the email to make sure I meet Ms. Maccabee's
5 objection.

6 I quote, This would be documented and saved,
7 closed quote. Is that what the email says?

8 A Well, yes, I see it. Yes, that's the words on
9 the page.

10 Q And does that sentence refer to a list of
11 issues that she discussed in the previous sentence?

12 MS. MACCABEE: Your Honor.

13 THE COURT: Yes.

14 MS. MACCABEE: Objection, the email speaks for
15 itself.

16 THE COURT: Sustained.

17 BY MR. SCHWARTZ:

18 Q Then she goes on to say that she understands
19 your wish to document future discussions?

20 MS. MACCABEE: Same objection, your Honor.

21 THE COURT: Sustained.

22 BY MR. SCHWARTZ:

23 Q In the bottom paragraph, does she refer to a
24 concern for ensuring accuracy in documentation of future
25 discussions?

1 MS. MACCABEE: Objection, same issue. Email
2 speaks for itself.

3 THE COURT: Sustained.

4 BY MR. SCHWARTZ:

5 Q And then she lists a series of bullets. And
6 the question I have is, is there anything in that series
7 of bullets or elsewhere in the email that refers to
8 written comments on the permit?

9 A It refers to written documentation of our
10 meetings.

11 Q All right. Earlier -- or rather, yesterday you
12 were talking about the purpose of meetings to avoid later
13 objections. That was the reason the EPA would meet with
14 permitting agencies. Is that right?

15 A That was one of the mechanisms that was used,
16 yeah. The goal was to avoid an objection.

17 Q Yeah. And does that purpose also apply to the
18 bi-monthly meetings that EPA held with MPCA over the
19 PolyMet permit?

20 A Which meetings were those?

21 Q I'm referring to the telephone meetings that
22 started in August of 1916 -- no, rather of 2016. I'm
23 betraying my age. The meetings in 2016 that went through
24 perhaps as long as October 2018.

25 MS. MACCABEE: Objection, your Honor, assumes

1 facts not in evidence.

2 THE COURT: Overruled.

3 MS. MACCABEE: Your Honor, there's no evidence
4 of bi-weekly [sic] meetings at any time in 2018, sir.

5 THE COURT: Well, then the witness can say
6 that.

7 THE WITNESS: We had a number of meetings
8 during that time frame, some included the company, so,
9 you know, it was an exchange of information. Again,
10 there was no exchange of permit language until the permit
11 was almost to public notice. You know, I -- I really
12 don't know how to answer that question more specifically
13 than that.

14 BY MR. SCHWARTZ:

15 Q All right. Well, the --

16 A It covers a lot of meetings and a lot of
17 conference calls.

18 Q Well, the EPA received a draft permit on
19 January 18 of 2018?

20 A Correct.

21 Q And the public comment period started on
22 January 31 of 2018?

23 A Yes.

24 Q And so EPA received an advance copy of the
25 permit. Is that correct? Advance to the --

1 A Yes.

2 Q -- public notice period.

3 A In advance of the public notice, the same time
4 the tribes received it, and I assume PolyMet had received
5 a copy as well.

6 Q I would like you to look at Exhibit 2009. I
7 would like you to look at it carefully, because you'll
8 see the subject matter is the Minntac permit.

9 THE COURT: Hearing no objection, the exhibit
10 is received.

11 BY MR. SCHWARTZ:

12 Q And in the email at the bottom, you write, "I
13 just want to confirm that you intend to follow the
14 approach we worked out on the PolyMet permit, which was
15 to provide the pre-proposed permit for a 45-day review by
16 EPA."

17 And take your time and look at that, because my
18 question is: Did EPA follow the approach of a 45-day
19 review for the Minntac permit?

20 MS. MACCABEE: Objection. This is referring to
21 a pre-proposed draft permit. It is not a pre-proposed
22 final permit.

23 BY MR. SCHWARTZ:

24 Q I'm just quoting from the language, the
25 language that --

1 THE COURT: Overruled.

2 THE WITNESS: We had talked about that process
3 on Minntac. I don't believe we ever followed that
4 process.

5 BY MR. SCHWARTZ:

6 Q So you didn't follow through?

7 A I don't believe so.

8 MR. SCHWARTZ: That concludes my questioning --

9 BY MR. SCHWARTZ:

10 Q Finally, I would like you to look at
11 Exhibit 679, which is the Permit Writers' Manual.

12 A Six what?

13 MR. BELL: 679.

14 BY MR. SCHWARTZ:

15 Q And what I would like you to look at is the
16 cover. And there's some writing in a little box --

17 A Hang on. Hang on a second. We're still trying
18 to locate the exhibit.

19 MS. BASSLER: It's 679. Is that correct?

20 THE COURT: Yes.

21 MS. BASSLER: It was entered earlier, I
22 believe, by Relators.

23 THE COURT: It was discussed this morning.
24 There's a little -- next page, whoever has the screen
25 being operated. There you go, and then --

1 THE WITNESS: Okay. I've got the exhibit here.

2 THE COURT: And then raise it up so the
3 language in the box can be seen there. Okay.

4 BY MR. SCHWARTZ:

5 Q Can you turn to the page that -- for us, it's
6 on the screen. It may be the second page of that
7 exhibit.

8 A Okay. I was hoping you didn't want me to read
9 it.

10 THE COURT: I didn't see that, but --

11 MR. SCHWARTZ: The court reporter would have a
12 hard time transcribing that.

13 THE COURT: Yeah, stand on one leg.

14 BY MR. SCHWARTZ:

15 Q So there's a little box you'll see with
16 language. And I'm going to read to you from about the
17 middle of that box. I'm quoting now. Quote,
18 Recommendations in this guidance are not binding. The
19 permitting authority may consider other approaches
20 consistent with the CWA and EPA regulations, closed
21 quote.

22 Does that language apply to the PolyMet permit?

23 A Well, this is a guidance. This applies to all
24 NPDES permits issued by EPA or the states under an
25 authorized program. This is pretty typical language that

1 we put in a guidance document.

2 MR. SCHWARTZ: All right. That does conclude
3 my cross-examination.

4 THE COURT: Redirect?

5 MR. MILLS: Your Honor, may I have a shot?

6 THE COURT: Oh, I'm sorry. You may have a
7 shot.

8 MR. MILLS: Thank you.

9 THE COURT: Figuratively speaking.

10 MR. MILLS: Of course.

11 CROSS-EXAMINATION

12 BY MR. MILLS:

13 Q Good afternoon, Mr. Pierard. Monte Mills on
14 behalf of PolyMet.

15 I want to show you --

16 A Good afternoon.

17 Q -- what's been marked as Exhibit 641.

18 MR. MILLS: A copy for you.

19 THE COURT: Thank you.

20 BY MR. MILLS:

21 Q It's an email string between you and
22 Christopher Korleski, Director Water Division at EPA. Is
23 that right?

24 A Yes.

25 THE COURT: Hearing no objection, the document

1 is received.

2 BY MR. MILLS:

3 Q Mr. Korleski was your supervisor, correct?

4 A Yes.

5 Q Looking at your email to Korleski in this
6 exhibit, did you notify him that the deadline for
7 providing comments was March 16, 2018?

8 A Yes.

9 Q And in this email from you to Korleski, did you
10 also notify him that that March 16, 2018 deadline was not
11 the deadline for EPA objections or non-objections?

12 A That's right.

13 MS. MACCABEE: Objection, document speaks for
14 itself.

15 THE COURT: Overruled. Answer can stand.

16 BY MR. MILLS:

17 Q Looking at your email to Korleski, did you also
18 advise him that EPA's concerns about the permit were not
19 insurmountable?

20 A Yes.

21 Q I want to move to another exhibit,
22 Exhibit 2010, please. Mr. Pierard, do you have this
23 Exhibit 2010 in front of you now?

24 A Yes, I do.

25 Q Is this Exhibit 2010 an email string between

1 you and Linda Holst at EPA?

2 A Yes.

3 THE COURT: It's already in evidence, already
4 received.

5 BY MR. MILLS:

6 Q Looking at your email to Holst in Exhibit 2010,
7 did you acknowledge that EPA had agreed not to submit
8 comments on the draft permit during the public notice
9 period?

10 A Oh, yes.

11 Q That was a yes, sir?

12 A Yes, you're right. Sorry, it took me a while
13 to get there.

14 Q Mr. Pierard, can you identify any statute that
15 prohibits MPCA and EPA from agreeing that EPA would not
16 submit written comments on the draft permit during the
17 public notice period?

18 MS. MACCABEE: Objection, calls for a legal
19 conclusion.

20 THE COURT: Overruled.

21 THE WITNESS: You asked if I was aware of any.
22 I'm not aware of any.

23 BY MR. MILLS:

24 Q Can you identify any regulation that prohibits
25 MPCA and EPA from agreeing that EPA would not submit

1 written comments on the draft permit during the public
2 notice period?

3 A Again, I'm not aware of any.

4 Q A few minutes ago, you had in front of you the
5 memorandum of agreement between EPA and MPCA, and you
6 testified yesterday you're familiar with that document.
7 Is that correct?

8 A Yes.

9 Q Can you identify any provision of the
10 memorandum of agreement between EPA and MPCA that
11 prohibits MPCA and EPA from agreeing that EPA would not
12 submit written comments on the draft permit during the
13 public notice period?

14 A No. I don't believe there's any prohibition
15 from such an agreement in the MOA.

16 Q Can you identify any --

17 THE COURT: Is there any background noise going
18 on in that room? We've got another feedback.

19 Okay. Let's proceed.

20 BY MR. MILLS:

21 Q Mr. Pierard, can you identify any statute that
22 prohibits MPCA from listening to EPA read its draft
23 comment letter to MPCA during a conference call to ensure
24 that MPCA fully understood EPA's questions and concerns
25 as MPCA developed the pre-proposed permit?

1 A No.

2 Q Can you identify any regulation that prohibits
3 MPCA from listening to EPA read its draft comment letter
4 to MPCA during a conference call to ensure that MPCA
5 fully understood EPA's questions and concerns as MPCA
6 developed the pre-proposed permit?

7 MS. MACCABEE: Objection only to the term
8 "pre-proposed permit," which is not what the witness
9 testified to.

10 THE COURT: Sustained.

11 BY MR. MILLS:

12 Q Can you -- I'll rephrase the question.
13 Can you identify any regulation that prohibits
14 MPCA from listening to EPA read its draft comment letter
15 to MPCA during a conference call?

16 A No.

17 Q And can you identify any provision of the
18 memorandum of agreement between EPA and MPCA that
19 prohibits MPCA from listening to EPA read its draft
20 comment letter to MPCA during a conference call?

21 A No.

22 Q Turning back to Exhibit 2010, did you
23 acknowledge that EPA had agreed with MPCA that EPA would
24 have a period of 45 days to comment on the draft
25 pre-proposed permit?

1 A Yes.

2 Q And looking at your email in Exhibit 2010,
3 after describing what EPA and MPCA had agreed to, your
4 email does not say that what they had agreed to was
5 unlawful, correct?

6 MS. MACCABEE: Objection, email speaks for
7 itself.

8 THE WITNESS: Yes.

9 THE COURT: Sustained. Answer stricken.

10 MR. MILLS: Your Honor, I'm asking for
11 something that's not in the document, so I don't think
12 the document speaks -- and I've never heard a document
13 say anything before. But you understand my point that
14 I'm trying to show what's not in the document.

15 THE COURT: Number one, I understand that
16 documents don't speak. Number two, the objection is
17 legalese that is accepted in the legal field. Number
18 three, if your intent was to ask him something that isn't
19 in the document, then you shouldn't have included the
20 document as a point of reference in your question, and
21 you just ask him what his understanding was.

22 BY MR. MILLS:

23 Q Mr. Pierard, once you described what EPA and
24 MPCA had agreed to, you did not say what they had agreed
25 to was unlawful, correct?

1 MS. MACCABEE: Objection, as a non-attorney
2 would -- excuse me. Calls for a legal conclusion and
3 asked him if he made a legal statement.

4 THE COURT: The question is vague as stated.
5 Why don't you reword it.

6 BY MR. MILLS:

7 Q So in this email to Ms. Holst in Exhibit 2010,
8 you described what EPA and MPCA had agreed to, correct?

9 A Correct.

10 Q And you did not say that what they had agreed
11 to was in any way improper, correct?

12 A She wasn't asking me for that. So I simply --
13 I simply acknowledged what we had agreed to.

14 Q Whether or not she asked you for that, you
15 didn't provide it to her, did you?

16 MS. MACCABEE: Objection, asked and answered.

17 THE COURT: Overruled.

18 THE WITNESS: In this email, I did not.

19 BY MR. MILLS:

20 Q In this email, you indicated to Ms. Holst that
21 EPA's decision to object was well off in the future,
22 correct?

23 A Yes. We hadn't received a proposed permit yet.

24 Q So you understood that whether or not EPA
25 submitted written comments, EPA had the power to object

1 to the permit, correct?

2 A Yes. Once we receive the proposed final
3 permit, we have the ability at that point to object.

4 Q I would like to turn to Exhibit 2009, please.

5 THE COURT: This exhibit is already in
6 evidence.

7 MR. MILLS: I believe that's correct.

8 BY MR. MILLS:

9 Q Exhibit 2009 is an email string between you and
10 Jeff Udd at MPCA, correct?

11 A Yes.

12 Q And you were discussing -- the subject line is
13 "Minntac Permit," correct?

14 A Yes.

15 Q And the Minntac permit is a separate permit
16 process from the PolyMet permit, correct?

17 A Yes.

18 Q After you describe in this email what EPA and
19 PCA had agreed to with respect to the PolyMet permit,
20 this email does not say that what EPA and MPCA had agreed
21 on was unlawful, correct?

22 A Correct.

23 Q And after describing what EPA and MPCA had
24 agreed to with respect to the PolyMet permit, your email
25 does not say that what they had agreed to was improper,

1 correct?

2 MS. MACCABEE: Objection, email speaks for
3 itself.

4 THE COURT: Overruled.

5 THE WITNESS: All right. Again, that question
6 wasn't asked of me. I was simply acknowledging that we
7 had this agreement with PolyMet and this suggestion is
8 apparently at the time that we follow a similar process
9 with the Minntac permit.

10 BY MR. MILLS:

11 Q And nowhere in that suggestion did you express
12 a concern that that would be improper, correct?

13 A That wasn't a question, so no.

14 Q Mr. Pierard, before starting your testimony
15 yesterday, did you communicate with anyone other than
16 your personal attorney about your anticipated testimony?

17 A Yes.

18 Q Who did you communicate with?

19 A Paula Maccabee.

20 Q Anyone else?

21 A No, I don't believe so.

22 Q How often did you communicate with
23 Paula Maccabee?

24 A Well, we had a -- she wanted to meet with us to
25 go over the exhibits, and we did that last Sunday. Prior

1 to that, it was a few phone calls.

2 Q And what did you talk about?

3 THE COURT: Was that Sunday the 19th or Sunday
4 the 12th?

5 MR. BELL: Nineteenth.

6 THE WITNESS: Nineteenth. Nineteenth.

7 THE COURT: Thank you.

8 BY MR. MILLS:

9 Q And what did you discuss with respect to your
10 testimony?

11 A Well, we went over the exhibits, and --

12 THE COURT: Was that in person or by phone?

13 THE WITNESS: In person.

14 THE COURT: Okay.

15 THE WITNESS: We went over the exhibits and, I
16 think, likely what questions would be coming out of this.
17 And I should clarify, too, that there were other people
18 on video, I think, from Minnesota when we were doing that
19 on Sunday. I had forgotten about that.

20 BY MR. MILLS:

21 Q Do you know who those other people on video
22 from Minnesota were?

23 A I presume they were all part of the Relators
24 group.

25 Q And what did you discuss?

1 A Simply going over the exhibits and what
2 questions might likely be asked of me.

3 Q Were there any questions that were discussed
4 that you had concerns about them?

5 A No.

6 Q Did you ask --

7 A Not that I recall, no.

8 Q Did you ask them not to ask you any questions
9 or a certain question?

10 A No.

11 Q And did you go over your answers to their
12 questions?

13 A To some degree, yes.

14 Q After starting your testimony yesterday, have
15 you communicated with anyone other than your personal
16 attorney about your testimony?

17 A I'm sorry. Could you repeat that?

18 Q Yes, sir. After starting your testimony
19 yesterday, have you communicated with anyone other than
20 your personal attorney about your testimony?

21 A Yeah. I've had a couple of phone calls from
22 Paula Maccabee.

23 Q How many phone calls with Paula Maccabee?

24 A Three or four.

25 Q And at what time was the first call?

1 A Maybe at a break yesterday afternoon.

2 Q And what time was the second call?

3 A Probably after the testimony yesterday.

4 Q And when was the third call?

5 A It would have been this morning, I believe.

6 Q And any other calls?

7 A Just after lunch, I believe, was a call as
8 well.

9 Q And that would have been today?

10 A Yes.

11 Q Going back to your call with Ms. Maccabee
12 during the break yesterday, what did you discuss?

13 A She told me I was doing good. And beyond that,
14 I can't really tell you. It was a very brief -- all of
15 these were very brief calls. More focused on this is how
16 we're going to proceed, what we may be talking about
17 next, and, you know, it was just -- I took it as kind of
18 preparing me for what was coming up.

19 Q So Ms. Maccabee was talking to you about what
20 she was going to ask you coming up next. Is that fair to
21 say?

22 A Generally, yeah. It was exhibits that might
23 come up and, generally, what she would be asking during
24 that time.

25 Q Did you express any concerns at that time about

1 questions that she planned to ask you?

2 A No.

3 Q Going back to yesterday after the testimony,
4 the call you had with Ms. Maccabee, what did you discuss?

5 A She had asked me a couple of clarifying
6 questions about some of the exhibits and what I had
7 testified to. I think she wanted to be sure she had it
8 right, you know, she understood my testimony.

9 Q Did you discuss anything else?

10 A No.

11 Q How long was the conversation?

12 A Last night, that might have been six or seven
13 minutes, I would say.

14 Q And this morning, you said you had a call with
15 Ms. Maccabee as well?

16 A Right.

17 Q And what did you discuss?

18 A Some of the testimony that had happened and
19 what was going to happen next. I think she was a little
20 bit concerned. You know, she knew I was anxious to get
21 this done, so I think she wanted to assure me that it was
22 going to move along, that she doesn't have much more to
23 go.

24 Q And --

25 THE COURT: Lawyers are always bad about

1 predicting how long things take.

2 BY MR. MILLS:

3 Q And you had a fourth phone call with
4 Ms. Maccabee today?

5 A Right. That was after, I think, the
6 cross-examination had started, and just some questions
7 she had for me about them.

8 Q And what questions did she have for you about
9 that?

10 A I really can't even relate them. It was pretty
11 generic. Yeah. I just can't even recall exactly what
12 they were about. She had questions, and I answered them.

13 Q Can you recall anything about the conversation?

14 A Other than -- we were talking about my
15 testimony, and, you know, she wanted -- she wanted to be
16 sure she had it right. She wanted to ask me more about
17 some of the things that I had said.

18 Q What, for example, was she concerned about what
19 you said?

20 MS. MACCABEE: Objection. That assumes a fact
21 not in evidence.

22 THE COURT: Overruled.

23 THE WITNESS: Yeah, it was -- I really -- it
24 was -- it was so non-consequential to me that I didn't
25 really commit it to memory. I'm sorry. I'm not trying

1 to be evasive. It's just I really don't recall exactly
2 what questions she had or even specifically what exhibits
3 it was about.

4 BY MR. MILLS:

5 Q Let's talk about Exhibit 2014, please.
6 Mr. Pierard, do you have Exhibit 2014 in front of you
7 now?

8 A Yes.

9 Q Is Exhibit 2014 an email string between
10 Shannon Lotthammer at MPCA and Kurt Thiede, Chief of
11 Staff Region 5 EPA, in which you were copied?

12 A Yes.

13 Q I want to draw your attention to page two of
14 the document, which at the bottom says EX. 2014-002.
15 When Kurt Thiede's email says that EPA intends to, quote,
16 continue a dialogue between MPCA staff and EPA staff, is
17 that statement consistent with your understanding of what
18 EPA and MPCA had agreed to do concerning the review of
19 the permit?

20 A Yes.

21 Q And looking at the same Exhibit 2014-002, when
22 Kurt Thiede's email says that EPA is, quote, hopeful our
23 discussions and the additional review will allow us to
24 come to an agreement and avoid objections, end quote, is
25 that statement consistent with your understanding of what

1 EPA hoped to accomplish?

2 A Yes.

3 Q I would like to turn to Exhibit 674, please.

4 Mr. Pierard, do you have Exhibit 674 in front of you now?

5 A Not yet. I got it now.

6 Q And this is an email string between you and
7 Ken Westlake at EPA, correct?

8 A Yes.

9 Q And looking at your email to Mr. Westlake, did
10 you acknowledge that EPA had agreed with MPCA that MPCA
11 would give EPA a revised draft pre-proposed permit based
12 on comments received during the public comment period?

13 MS. MACCABEE: Objection. It says "revised
14 draft," not "revised draft pre-proposed draft."

15 THE COURT: Sustained. Misrepresents the
16 exhibit.

17 MR. MILLS: I'll rephrase.

18 BY MR. MILLS:

19 Q Did you acknowledge that MPCA agreed to give
20 EPA a revised draft based on comments received during the
21 comment period?

22 A Yes.

23 Q And did you also acknowledge that EPA had
24 agreed with MPCA that EPA would have 45 days to provide
25 written comments on that draft?

1 A Yes.

2 Q Turn to Exhibit 2020, please.

3 Mr. Pierard, do you have Exhibit 2020 in front
4 of you now?

5 A Yes.

6 Q Is this an email from you to Linda Holst at
7 EPA?

8 A Yes.

9 THE COURT: Hearing no objection -- I don't
10 think this was received before. Or was it?

11 MR. MILLS: I don't believe it was, your Honor.
12 I don't believe so.

13 THE COURT: Okay. I don't have it in my notes.
14 If it wasn't received before, it is now. How is that?

15 MR. MILLS: Thank you, your Honor.

16 BY MR. MILLS:

17 Q Looking at your email to Ms. Holst in
18 Exhibit 2020, did you acknowledge that EPA had received
19 the proposed permit fact sheet and response to comments
20 on December 4, 2018?

21 A Yes.

22 Q And in this email, did you acknowledge that EPA
23 had 15 days to review the proposed permit starting on
24 December 4, 2018?

25 A Yes.

1 Q I would like to turn to Exhibit 2021, please.

2 Mr. Pierard, do you have Exhibit 2021 --

3 A Yes.

4 Q -- in front of you now?

5 THE COURT: Hearing no objection, the exhibit
6 is received.

7 BY MR. MILLS:

8 Q Is Exhibit 2021 an email string between you and
9 Richard Clark at MPCA?

10 A Yes.

11 Q And in this email, Exhibit 2020 [sic], did you
12 acknowledge that EPA had received the proposed permit,
13 fact sheet, and response to comments on Tuesday,
14 December 4, 2018?

15 A Yes.

16 Q And in this email, did you apologize to
17 Mr. Clark for not sending the confirmation earlier?

18 A Yes.

19 MR. MILLS: Thank you.

20 No further questions at this time.

21 THE COURT: Redirect?

22 REDIRECT EXAMINATION

23 BY MS. MACCABEE:

24 Q Mr. Pierard, let's turn back to Exhibit 2010.
25 And then if anyone has an extra copy for me, that would

1 be wonderful. 2010. That's not what --

2 THE COURT: I have one.

3 MS. MACCABEE: Thank you, your Honor. I really
4 appreciate it.

5 BY MS. MACCABEE:

6 Q If you look --

7 A Okay. I've got it.

8 Q Mr. Pierard, can you look at the bottom of this
9 email, after the end of the public comment period, "we
10 provided essentially by reading our comment letter" and
11 it says, "to make sure that MPCA fully understood our
12 questions."

13 Mr. Pierard, did MPCA ever put their response
14 to your comments in their document response to comments?

15 A No, not that I'm aware of.

16 Q Thank you.

17 And next, if you could pull Exhibit 815. And
18 that is the memorandum -- the email on November 20, 2017
19 between Mr. Korleski and Ms. Flood.

20 A That was Exhibit 815?

21 Q Yes, I believe so.

22 A 815. I've got it.

23 Q And does this document reflect an agreement
24 between EPA and MPCA regarding submitting comments?

25 A Yes.

1 Q And what was the nature of the agreement that
2 was reached between MPCA and EPA regarding EPA's
3 submission of comments on November 20, 2017?

4 A Well, we had been -- we had been talking to
5 MPCA. I had mentioned earlier we wanted a longer period
6 of time to review the pre-public notice draft permit that
7 became controversial. MPCA didn't want to do that. So
8 Chris ultimately agreed with Rebecca that providing it
9 just 15 days before the start of the public comment
10 period would be sufficient.

11 Q And what did -- in this agreement, after MPCA
12 said they would not provide the pre-public notice draft
13 60 days ahead of time, what did EPA and MPCA agree to
14 regarding EPA's submission of comments during the public
15 notice period?

16 A Well, Chris' email says, "EPA will not be
17 providing any comments until after we've had a chance to
18 review the draft," meaning that the draft public notice
19 version of the permit.

20 Q And what did EPA agree above, and that says --
21 in the communication from Ms. Flood to Mr. Korleski?

22 A She thanked Chris for the email and said she
23 looked "forward to any comments you may wish to provide."

24 Q And did you perceive this agreement as an
25 agreement that EPA would provide comments on the draft

1 PolyMet permit within the public notice period?

2 MR. SCHWARTZ: Objection, leading.

3 THE COURT: Sustained.

4 BY MS. MACCABEE:

5 Q What did you perceive, Mr. Pierard, as to
6 MPCA's and EPA's agreement about when EPA would provide
7 comments on the draft PolyMet permit?

8 A Our intent at the time was to provide comments
9 during the comment period. And I believe that was clear
10 to PCA at this point in time.

11 Q And did you understand that the parties, EPA
12 and MPCA, had agreed to that?

13 A That's what I believe this represented, yes.

14 Q In your cross-examination with Mr. Schwartz,
15 you talked about a call from Shannon Lotthammer and that
16 one of the things Ms. Lotthammer said in that call is
17 that it would be efficient for EPA to wait until after
18 the public notice comment period had lapsed and then to
19 provide its comments later. Do you remember that
20 testimony?

21 A Yes.

22 Q From your perspective, was the process that
23 Ms. Lotthammer suggested efficient?

24 A Well, no. I would have to say just no.

25 Q Now, in that call, you testified on

1 cross-examination that Shannon -- that Ms. Lotthammer,
2 excuse me, asked if she could provide 45 days on a
3 proposed final permit. Is that what you recall of the
4 call?

5 MR. SCHWARTZ: Objection. I don't think that's
6 what the testimony was.

7 THE COURT: Overruled. If it's accurate, you
8 can agree. If it's not, you can disagree.

9 THE WITNESS: Okay. Could you repeat that
10 question?

11 BY MS. MACCABEE:

12 Q In the call with Ms. Lotthammer, did
13 Ms. Lotthammer propose that EPA could have extra time
14 beyond 15 days to comment when the final permit was
15 proposed? Was that her initial suggestion?

16 A Yes.

17 Q If we could turn now to the memorandum of
18 agreement, Exhibit 328. Give you a couple minutes to
19 find section 124.46 on paragraph 5. And I believe that
20 is from pages 10 to 11. Actually, Mr. Pierard, just in
21 case we don't remember it all, let's start at the page
22 beforehand, on page 9, which is also section 124.46. And
23 it's paragraph 1. And do you remember we talked about
24 this paragraph yesterday? It seems like a lot longer.
25 But we talked about this yesterday. And what does the

1 memorandum of agreement says would happen at the time of
2 the public notice period in paragraph 1?

3 A It says that the director shall transmit one
4 copy of the public notice, the fact sheet, and the
5 proposed permit and a list of all persons receiving the
6 public notice, fact sheets, and permit, together with a
7 description of any other procedure used to circulate the
8 public notice to the regional administrator.

9 Q So those are requirements for the public notice
10 draft permit, correct?

11 A Yes.

12 Q And then let's turn back to number 5. Does
13 that talk about the proposed final permit? I'm sorry.
14 Does paragraph 5 on pages 60802 to 60803 talk about the
15 time when a final permit is proposed?

16 A Yes.

17 Q And how many days is EPA allowed to respond or
18 comment on a proposed final permit according to the --

19 A Fifteen days.

20 Q I'm sorry. Can you say it again?

21 A Fifteen days. Fifteen days.

22 Q So when Shannon Lotthammer asked you if EPA
23 could have 45 days on a proposed final permit, what did
24 you respond?

25 A Well, I didn't believe that we could do that.

1 I didn't believe that the MOA really allowed for that
2 kind of adjustment on a case-by-case basis.

3 Q Did you suggest to Ms. Lotthammer that to do
4 what she had requested might require an amendment of the
5 memorandum of agreement?

6 A I don't believe I suggested that, but another
7 person in the room did.

8 Q And if you could turn to the miscellaneous
9 section of the first part of the memorandum of
10 agreement -- and let me give you the exact pages. That
11 starts on Relators 60807 and goes on to 60808. So let's
12 look at paragraph 2, which is on 60808. Does that
13 paragraph on -- paragraph 2 of the memorandum of
14 agreement describe how a memorandum of agreement can be
15 modified?

16 A Yes.

17 Q And what would it entail for a memorandum of
18 agreement to be modified? And feel free to look at the
19 document and read out the relevant portions as you go
20 through.

21 A It would be a submittal of a modification to
22 the regional administrator, and then it would be public
23 hearings on the proposal to modify.

24 Q And then after the public hearing, what would
25 be the next step? If you look down, "Any revisions

1 following the public hearings shall be finalized, reduced
2 to writing, approved by the agency, signed by the
3 director and the chairman of the agency and the regional
4 administrator."

5 And then what would happen next? Where would
6 they have to go?

7 A The regional -- the regional administrator
8 would review and approve with the changes.

9 Q And is that on the next page on paragraph 3
10 that the agreements would have to be reviewed by the
11 administrator of the EPA?

12 A It says the agreements are subject to review by
13 the administrator.

14 Q So it would be possible to amend the memorandum
15 of agreement to allow for a 45-day comment period. But
16 in your opinion, it would not be possible to provide for
17 a 45-day review on a final permit without that
18 modification. Is that correct?

19 A Correct.

20 Q Do you have any --

21 A Not in the time frame they were looking for.

22 Q Do you have any experience that would give you
23 a chance to estimate how long the time frame would be to
24 modify a memorandum of agreement?

25 A We had a minor -- a relatively minor

1 modification in Wisconsin's MOA, and that took us years
2 to complete.

3 Q Okay. So --

4 A And -- yeah.

5 Q So did EPA and MPCA come up with another
6 solution?

7 A Yes.

8 Q And if you could turn now to the Exhibit 64,
9 which -- and that is the email chain back and forth, I
10 believe, between Mr. Thiede and Ms. Lotthammer on
11 March 16. Don't put away the memorandum of agreement,
12 please, though. We're not quite done.

13 A Okay. Okay, I've got that.

14 Q Okay. And I'm sorry that it's not yet up on
15 the screen here. Hopefully, everybody has that document.

16 THE COURT: 64?

17 MS. MACCABEE: 64, yes, your Honor. And that
18 was one that counsel for the MPCA was discussing and
19 counsel for PolyMet was discussing.

20 If you could show the second page of that
21 document where it has Mr. Thiede's comments or response.

22 BY MS. MACCABEE:

23 Q Right at the top of that document, and this is
24 part of the email written by Mr. Thiede, it says, "Once
25 MPCA completes their response to public comments, it will

1 develop a pre-proposed permit."

2 Do you see that language?

3 A Yes.

4 Q Is there anything in the memorandum of
5 agreement that describes what happens or what is a
6 pre-proposed permit after the public notice period?

7 A No. There's nothing in the MOA on that.

8 Q Have you seen the term "pre-proposed permit"
9 used for a permit after the public notice period has
10 completed, in your experience?

11 A No.

12 Q So was this something made up for the PolyMet
13 project?

14 A Yes.

15 Q In your opinion -- in your personal opinion,
16 would that be something common or unusual?

17 A We've never done it before, in my experience,
18 so I would say unusual, yes.

19 Q Now, I'm going to turn to -- I'm sorry about
20 the exhibit numbers not having everything here. But it's
21 Exhibit 674. And that was, again, one of the exhibits
22 that counsel for, I believe, the Pollution Control Agency
23 referred to. And this, Mr. Pierard, is your email from
24 March 20, 2018.

25 A Yes, I've got it.

1 Q We'll have it soon. I think the Court already
2 has it.

3 And in your email to Mr. Westlake, did you
4 describe what the MPCA agreed to do was to give EPA
5 another revised draft permit after the comments were
6 received?

7 A Yes.

8 Q Do you remember when you testified yesterday
9 about you believing it was desirable to have a pre-public
10 notice draft permit early enough to make comments in
11 order to avoid the need to do a second public notice if
12 there were substantial changes made after the public
13 notice draft had been completed?

14 MR. MILLS: Objection, beyond the scope of
15 cross.

16 THE COURT: Overruled.

17 THE WITNESS: Yes, I remember that.

18 BY MS. MACCABEE:

19 Q In discussing -- did you discuss the idea of
20 having a revised draft permit with the MPCA before making
21 this agreement?

22 A I'm sorry. Could you repeat that?

23 Q I'm sorry. That was unclear.

24 Did you discuss with MPCA what might be the
25 ramifications of having a revised draft after the public

1 notice comment period had closed on the PolyMet project?

2 MR. SCHWARTZ: Objection. It's not clear who
3 "you" refers to, whether it's the agency or Mr. Pierard.

4 THE COURT: Sustained.

5 BY MS. MACCABEE:

6 Q Mr. Pierard, did you -- first, did you
7 personally discuss with MPCA what might be the
8 ramifications of having a second revised draft permit
9 after the public notice period had closed in the case of
10 the PolyMet NPDES Permit?

11 A Yes.

12 Q And what did you say to -- what did you advise
13 MPCA?

14 A And this is the exact conversation I had had
15 with other states when we discussed EPA's comments on a
16 draft of a notice permit, that the potential is that the
17 comments are so significant, significant changes are
18 required to be made to the permit that it may require the
19 state to re-public notice the new permit after the
20 revisions were made. And the issue there is that it's a
21 waste of process, you know, that there's -- that the
22 reason we review pre-public notice drafts is to try and
23 avoid objection and try to avoid the eventuality of
24 having to do another round of public notice and comment
25 and kind of extend the process. It's just much more

1 efficient. So yeah, that was the concern I expressed to
2 PCA.

3 Q And if there are substantial changes in a draft
4 permit after the public notice permit has lapsed or has
5 been completed, do you recall, in your experience,
6 recommending to states that they hold a second public
7 notice period?

8 A Yes, I do.

9 THE COURT: Who decides whether to have a
10 second public notice period if there are revisions to the
11 draft based on EPA comments?

12 THE WITNESS: I believe the state decides.

13 THE COURT: Okay.

14 BY MS. MACCABEE:

15 Q In making -- in the state's decision whether or
16 not to have a public notice period, is one of the factors
17 in that decision whether the changes made to the draft
18 permit are substantial?

19 A Yes.

20 Q I think you mentioned in one of your other
21 answers a couple minutes ago something about the time
22 frame they were looking for. In that -- when you made
23 that comment, who was the, quote-unquote, they you were
24 speaking about?

25 A Can you repeat that? I'm not sure I

1 understand.

2 Q I'm going to ask it differently. Obviously
3 confusing.

4 A Okay. Okay.

5 Q Sometime in December, did you talk to Mr. Udd
6 at the MPCA over the phone?

7 A Yes.

8 Q And did Mr. Udd ever communicate to you
9 anything about MPCA's desired time frame for completing
10 the issuance of the PolyMet NPDES Permit?

11 A Yes.

12 THE COURT: Is this December of 2017 or
13 December of 2018?

14 BY MS. MACCABEE:

15 Q Mr. Pierard, were you speaking then of talking
16 with Mr. Udd in December of 2018?

17 A Yes.

18 Q And could you just relate to us what you were
19 told by Mr. Udd when you and he had a phone conversation
20 in December 2018 about MPCA's desired timing for
21 completing issuance of the PolyMet NPDES Permit?

22 A He expressed a desire to have
23 Commissioner Stine sign the permit, and he mentioned that
24 Commissioner Stine would be waiving -- I think the
25 administration was changing, so he was hoping that they

1 could be moved up or moved along so that
2 Commissioner Stine was still in place when the 15-day
3 period ended on the proposed permit.

4 MS. MACCABEE: Your Honor --

5 THE COURT: Yes.

6 MS. MACCABEE: -- could I have a little leeway
7 to ask a question that's outside the cross?

8 THE COURT: Better tell us what the question is
9 and see how --

10 MS. MACCABEE: I went through --

11 THE COURT: -- people react.

12 MS. MACCABEE: Sir, in your discussion of the
13 reason for the ruling on Exhibit 525, you mentioned that
14 it was possible that a document was prepared in order to
15 persuade supervisors of the course of action that EPA
16 might take. And I went over my notes, and that doesn't
17 seem at all to be what the witness said was the reason he
18 prepared his -- the memorandum of December 18. And I
19 would like to have a chance to put it on the record so
20 that it doesn't appear that that's the reason when
21 that's --

22 THE COURT: I didn't say that was the reason.
23 I said that was a potential use of the document.

24 MS. MACCABEE: Okay.

25 THE COURT: I don't think it's particularly

1 relevant whether he thought it was written for that
2 purpose or not since -- my point was that that was a
3 potential use of the document.

4 MS. MACCABEE: It would just be one question.

5 THE COURT: Since it involves a document that I
6 excluded, it wouldn't be appropriate anyway.

7 MS. MACCABEE: Okay, your Honor.

8 THE COURT: All right.

9 MS. MACCABEE: No further questions.

10 THE COURT: Any further cross?

11 I have a question. Sir, did you ever recommend
12 to the MPCA that there be a second public comment period
13 based on revisions to the permit following the original
14 public notice period?

15 THE WITNESS: I can't say that I did, no.
16 Usually, when I talk about that with states, it's, you
17 know, for them to understand that that's a possibility
18 that they may need to re-public notice. And, you know,
19 if they chose not to, and the changes were really
20 substantial, it just potentially opens them up to
21 litigation simply because they chose not to re-public
22 notice the comment. So, you know, the bias, I thought,
23 should be if the changes were substantial they should
24 move forward with re-public notice. And I believe that
25 that's what EPA would do in that similar circumstance.

1 THE COURT: If you thought it was appropriate
2 to have a second public notice period, was it your
3 practice to so advise states?

4 THE WITNESS: I don't believe I ever did that.

5 THE COURT: Okay.

6 THE WITNESS: I don't believe I advised them
7 that they should.

8 THE COURT: All right.

9 THE WITNESS: Because, as I understood it, that
10 was a state decision for them to make.

11 THE COURT: Okay. So as far as you went was to
12 tell them the possibility might be out there, so keep
13 that in mind?

14 THE WITNESS: Basically, yes.

15 THE COURT: Okay.

16 Exhibits 164, 174, and 530, it was represented
17 in the record that you signed them. Your signature block
18 was on those three documents, but someone else's name was
19 on them. And then right before their name it said "for."
20 Is that something that you had a practice of doing?

21 THE WITNESS: That would mean I was not in the
22 office, so I would designate a person to act for me in
23 some things to pick up my responsibilities as branch
24 chief for that day or that week if I wasn't in the
25 office.

1 THE COURT: Okay.

2 THE WITNESS: So they would sign for me.

3 THE COURT: Good. Thank you.

4 Anyone have any follow-up questions based on
5 what I asked?

6 MR. MILLS: No. Thank you, your Honor.

7 THE COURT: Anyone have any other follow-up
8 questions by way of recross?

9 MR. SCHWARTZ: No, your Honor.

10 MR. MILLS: No, thank you, your Honor.

11 THE COURT: All right.

12 Well, guess what, you're excused. A hallelujah
13 moment. Thank you.

14 Just in time for our mid afternoon break.

15 (A recess was taken at 3:03 p.m. until 3:24 p.m.)

16 THE COURT: Remain seated.

17 MR. PENTELOVITCH: Hello.

18 THE COURT: Hello. Are we ready to proceed?

19 MR. PENTELOVITCH: More properly, good
20 afternoon, your Honor.

21 THE COURT: Yes. Good afternoon.

22 MR. PENTELOVITCH: You Honor, before I proceed
23 with the next live witness, if live is the right term,
24 we're going to read a few excerpts from the deposition of
25 Minnesota Pollution Control Agency designee Jeff Udd by

1 written questions. The transcript was made from a
2 deposition taken on October 15, 2019. They're relatively
3 brief excerpts, and I'm going to try to read very slowly.

4 THE COURT: All right.

5 MR. PENTELOVITCH: The first excerpt is from
6 page 11.

7 THE COURT: There is another alternative, and
8 that would be to copy the pages and highlight what you
9 would like read and agree to its receipt as a court
10 exhibit as if it was read into the record.

11 MR. PENTELOVITCH: If you would prefer that, we
12 can. I was hoping to just get this into the record
13 before the next witness comes on, so...

14 THE COURT: Are they ready to go if we were to
15 do this, or do we have time to --

16 MR. PENTELOVITCH: As I understand, he's here,
17 so --

18 THE COURT: How long -- how many pages are we
19 talking about?

20 MR. PENTELOVITCH: It's maybe a total of a page
21 to a page and a half.

22 THE COURT: If that's all, I think we can live
23 with it. If it was any longer -- the idea is time. It
24 sounds like even if you slowed down, it's still about a
25 ten-minute exercise, so I'm okay with that.

1 MR. PENTELOVITCH: Five to ten, yeah.

2 THE COURT: Okay.

3 MR. PENTELOVITCH: All right. So the first
4 excerpt is from page 11, lines 3 through 19. The
5 question is:

6 "Please explain why Ms. Lotthammer's March 13,
7 2018 email was not produced in response to
8 WaterLegacy's five Data Practices Act requests
9 beginning on March 26, 2018, or Minnesota Center for
10 Environmental Advocacy's June 19, 2019 data
11 practices request.

12 "The Witness: Sharon [sic] Lotthammer
13 regularly managed her emails, and it was deleted
14 prior to any outstanding DPA requests."

15 Next question: "If MPCA claims that
16 Ms. Lotthammer's March 13, 2018 email has been
17 discarded, state from which paper files and
18 computers it was discarded, by whom, and on what
19 date.

20 "The Witness: Shannon did not print a copy of
21 the email she had deleted from the system, and she
22 does not recall the date that she deleted the
23 email."

24 That's the end of that excerpt. The next
25 excerpt is page 12, line 18, through page 13, line 2.

1 "Question: Has MPCA retained either
2 Mr. Schmidt's original handwritten notes of
3 April 15 [sic], 2018, or his typed document
4 regarding the substance of that call?"

5 Mr. Schwartz interposes the following: "The
6 witness may answer the question, but at this point,
7 I just want to register an objection for lack of
8 foundation for part of the question."

9 THE COURT: That's handwritten notes of April 5
10 call?

11 MR. PENTELOVITCH: Yes, April 5, 2018, or his
12 typed document regarding the substance of that call.
13 Going back to Mr. Schwartz, he says:

14 "Having done that, the witness may answer.

15 And the answer is, "No."

16 At this point, your Honor, I would like to
17 offer into evidence that portion of Exhibit 837 which was
18 privilege log, I believe, 301 that was redacted by the
19 Court and provided yesterday that constitutes pages 27,
20 28, and 29 of that document, which I believe we can all
21 agree are the April 5, 2018 notes of Mr. Schmidt in
22 typewritten form. So I would offer those pages of
23 Exhibit 837.

24 MR. MARTIN: No objection.

25 THE COURT: Received.

1 MR. PENTELOVITCH: I'll hand those up to the
2 Court.

3 The next excerpt I am going to read --

4 THE COURT: Before we go any further, you are
5 only offering the specified pages. You're not offering
6 all of 837?

7 MR. PENTELOVITCH: Not at this time.

8 THE COURT: Okay. But if you do offer the rest
9 of this exhibit, it will be 837 and not some other
10 duplicate --

11 MR. PENTELOVITCH: That is correct.

12 THE COURT: -- duplicative document?

13 MR. PENTELOVITCH: That is correct.

14 THE COURT: Okay.

15 BY MR. PENTELOVITCH:

16 Q The next excerpt begins on page 14, line 19,
17 and continues through page 15, line 13. And it proceeds
18 as follows:

19 "Question: Since the" --

20 THE COURT: Hold on. Before you go on, I want
21 to check. I'm going to still want you to give me a copy
22 of that transcript you're reading from --

23 MR. PENTELOVITCH: We can do that.

24 THE COURT: -- which will be marked as a court
25 exhibit.

1 MR. PENTELOVITCH: We also have it marked as
2 Exhibit 702, if you prefer to do it that way.

3 THE COURT: It's already printed and marked?

4 MR. PENTELOVITCH: Yeah.

5 THE COURT: We'll take it. So Exhibit 702 will
6 be excerpts of the Udd deposition as read.

7 MR. PENTELOVITCH: Right. We'll highlight the
8 portions that I read and give it to you that way.

9 THE COURT: And there won't be an objection?

10 MR. MARTIN: No objection, your Honor.

11 THE COURT: All right. That will be received
12 upon receipt.

13 Go ahead.

14 MR. PENTELOVITCH: Starting at 14, line 19, the
15 question:

16 "Since the 1974 MPA" -- and that's a
17 reference, to the -- I believe that is to the
18 memorandum of agreement. It's a typo. So it should
19 be "since the 1974 MOA, "identify every NPDES permit
20 other than the PolyMet NPDES Permit for which EPA
21 prepared written comments on the draft NPDES permit,
22 did not send the written comments, and instead read
23 the comments aloud to MPCA.

24 "The Witness: The MPCA is not aware of any.

25 "Question: Since the 1974 MOA, identify every

1 NPDES permit where EPA commented upon or objected to
2 MPCA's proposed final NPDES permit.

3 "Mr. Schwartz: And at this point, I want to
4 state for the record the parties have agreed, and I
5 believe the Judge required that the start date for
6 this question would be --

7 "Ms. Maccabee: 1990.

8 "Mr. Schwartz: Yeah, January of 1990 as
9 opposed to 1974. But with that qualification, the
10 witness may answer.

11 "I'm providing" -- "The Witness: I'm
12 providing the list that is responsive to question 5.
13 It has question 5 on top of it."

14 And, your Honor, that is already in
15 evidence, I believe, as Exhibit 706 with the notation
16 "Question 5" handwritten on it.

17 The next excerpt is from page 16, lines 14 to
18 19 -- I'm sorry, lines 15 to 19.

19 "Since January 1, 2000, identify every NPDES
20 permit where EPA commented upon or objected to
21 MPCA's proposed final NPDES permit.

22 "The Witness: A list was provided that's
23 responsive to question 6."

24 Your Honor, I believe that's already been
25 admitted into evidence as Exhibit 70 -- I'm sorry. Take

1 that back. It's not admitted into evidence. I will get
2 it for you and offer it before we're done today.

3 THE COURT: All right.

4 MR. PENTELOVITCH: Then going to page 17, line
5 9 -- I'm sorry. Line 5.:

6 "Since January 1, 2010, state the date of
7 every meeting MPCA" --

8 Strike that. I didn't mean to read this
9 part. I'm going to skip that.

10 The next portion we're going to read is on page
11 20, beginning at line 13, through page 21, line 12:

12 "State MPCA's understanding, as of
13 December 20, 2018, the date when the PolyMet NPDES
14 Permit was issued, whether the following documents
15 would be part of the administrative record provided
16 to the Court of Appeals, should the MPCA's permit
17 decision be appealed:

18 "(a) EPA's written comments on the draft
19 PolyMet NPDES Permit;

20 "The Witness: As of December 20, 2018, the
21 PCA did not have any written comments from the EPA.

22 "(b) any notes from April 5, 2018, when EPA
23 read its comments on the draft PolyMet NPDES Permit
24 to MPCA over the phone.

25 "The Witness: As of December 20, 2018, MPCA

1 did not have any notes from the April 5, 2018 phone
2 call with EPA.

3 "(c) Shannon Lotthammer's March 13, 2018 email
4 to Kurt Thiede.

5 "The Witness: As of December 20, 2018, the
6 MPCA did not have the March 13, 2018 email."

7 I have one more. Oh, this is the one I meant
8 to read earlier and I skipped.

9 Question, page 16, line 15: "Since January 1,
10 2000, identify every NPDES permit where EPA
11 commented upon or objected to MPCA's proposed final
12 NPDES permit.

13 "The Witness: A list was provided that's
14 responsive to Question 6."

15 And that is, your Honor, Exhibit 707. Yeah.
16 And that is the end of what I intend to read.

17 MR. MARTIN: Thank you.

18 THE COURT: All right. I look forward to
19 receiving Exhibit 702.

20 MR. PENTELOVITCH: We're going to next call to
21 the stand Mr. John Linc Stine as our next witness.

22 MR. MARTIN: And I saw him outside, so I'll go
23 get him.

24 THE COURT: All right. Bring him in.

25 Off the record for a moment.

1 (Discussion was held off the record.)

2 THE COURT: Mr. Stine, come on down. Before
3 you sit down, raise your right hand. Do you swear to
4 tell the truth, the whole truth, and nothing but the
5 truth, so help you God?

6 THE WITNESS: I do.

7 THE COURT: Sit down, state your full name, and
8 spell it, please.

9 THE WITNESS: My name is John Linc Stine,
10 J-o-h-n, L-i-n-c, S-t-i-n-e.

11 THE COURT: You may inquire.

12 JOHN LINC STINE,

13 duly sworn, was examined and testified as follows:

14 CROSS-EXAMINATION

15 BY MR. PENTELOVITCH:

16 Q Good afternoon, Mr. Stine. My name is
17 Bill Pentelovitch, and I represent Friends of the
18 Boundary Waters Wilderness, the Center for Biological
19 Diversity and the Minnesota Center for --

20 A Environmental Advocacy.

21 Q Exactly. Thank you. Just too many clients to
22 remember.

23 I understand that you worked at the
24 environmental -- Minnesota Pollution Control Agency
25 starting in approximately 1999. Is that correct?

1 A No.

2 Q When did you start?

3 A I started there in 2011.

4 Q 2011. All right. And prior to that, you
5 worked for the DNR. Is that correct?

6 A Prior to working for the Pollution Control
7 Agency, I worked for the Minnesota Department of Health.

8 Q Okay. And prior to that for the DNR?

9 A Yes, that's correct.

10 Q Okay. So starting in, if I understand this
11 correctly, May 12 -- I'm sorry, May of 2012, you became
12 the Commissioner of the Minnesota Pollution Control
13 Agency?

14 A That's correct.

15 Q And you remained in that position until January
16 of 2019. Is that correct?

17 A Yes.

18 Q So I take it that means you were appointed by
19 Governor Dayton and left office when Governor Walz took
20 office?

21 A That's correct.

22 Q All right. And prior to being the commissioner
23 from March 11 -- March 2011 to May 2012, you were the
24 deputy commissioner at MPCA. Is that correct?

25 A Yes.

1 Q What were you deputy commissioner of exactly?

2 A The agency.

3 Q From February 2009 to March 2011, you were an
4 assistant commissioner at the MPCA. Is that right?

5 A At the Minnesota Department of Health. I was
6 assistant commissioner for the Health Protection Bureau.

7 Q Got to fix the LinkedIn page.

8 All right. So you were the commissioner of the
9 MPCA --

10 THE COURT: His mistake is your fault,
11 Mr. Stine.

12 BY MR. PENTELOVITCH:

13 Q I'm not going to say that. You know, it's
14 always good to have your social media up to date.

15 Throughout the period that the PolyMet permit
16 was under consideration, beginning in the summer of 2016
17 until the permit was issued in 2018, you were the
18 commissioner. Is that correct?

19 A Between 2016 and 2018, yes, I was commissioner.

20 Q The first exhibit I want to show you is
21 Exhibit 382.

22 And I will give the Court a copy. And I've got
23 to do this this way.

24 THE COURT: You gave me two of them. So you
25 may want to use that.

1 BY MR. PENTELOVITCH:

2 Q Yeah.

3 Mr. Stine, Exhibit 382 is a letter dated
4 September 24, 2015, on letterhead of the Minnesota
5 Department of Natural Resources and the Minnesota
6 Pollution Control Agency.

7 THE COURT: Hearing no objection, the document
8 is received.

9 BY MR. PENTELOVITCH:

10 Q It is addressed to Attorney General Lori
11 Swanson. And if you would turn to the last page of the
12 exhibit, there are two signatures there. Is one of those
13 signatures yours, sir?

14 A Yes.

15 Q And you are signing as commissioner of the
16 MPCA, correct?

17 A Correct.

18 Q The other signature belongs to the commissioner
19 of the DNR. Is that correct?

20 A Yes.

21 Q And the purpose of this letter was to request
22 approval to hire outside counsel to represent DNR and
23 MPCA in connection with the NorthMet project for PolyMet,
24 correct?

25 A Yes.

1 Q And in the letter, on the first page, you and
2 Commissioner Landwehr state that "The NorthMet Project
3 presents the DNR and MPCA with complex and unprecedented
4 environmental and human health questions."

5 Did you believe that to be a true statement at
6 the time it was made?

7 A Yes.

8 Q As you go on in that paragraph, you refer to
9 the fact that you are seeking -- or needing effective
10 representation, and I'll read in the last three lines of
11 the paragraph, "in the likely event of a legal challenge
12 to the DNR and PCA's decision making during both the
13 Final Environmental Impact Statement and potentially the
14 permitting process, should the FEIS be determined
15 adequate."

16 Did I read that correctly?

17 A Yes.

18 Q Turn, if you would, to the second page of the
19 letter. There's a section there headed "Necessary Legal
20 Expertise," an introductory paragraph and five bullets
21 points. I want to call your attention to the last
22 paragraph under "Necessary Legal Expertise." You wrote
23 there, "In addition to the technical expertise necessary,
24 it is also imperative that our legal team is engaged with
25 us on a real-time basis to ensure that the many decisions

1 in front of us are defensible and consistent with an
2 overall litigation strategy," correct?

3 A Yes.

4 Q And what did you mean when you talked about an
5 overall litigation strategy?

6 A Well, there was an expectation that there may
7 be challenges to any number of the decisions under
8 environmental review permitting or other requirements of
9 reaching a final decision on the permit and other
10 matters.

11 Q Now, in the very next section, it's entitled
12 "Past Precedent for Outside Counsel," and it states, "The
13 complexity of the litigation surrounding NorthMet is
14 comparable to Reserve Mining," and then it goes on to
15 name several other pieces of litigation.

16 Now, what did you know yourself about the
17 Reserve Mining case?

18 A Only what I had read about it. And I had seen
19 the area when I toured the North Shore near Silver Bay.

20 Q Were you aware that much of the litigation
21 involving Reserve Mining took place in the United States
22 District Court for the District of Minnesota?

23 A Vaguely. I am sure I was aware, but today, I
24 would have to remember pretty specifically that point.
25 No, today I'm not aware. Then I probably was.

1 Q At the time, do you recall being aware that
2 there were several important decisions in that case in
3 the United States Court of Appeals for the Eighth
4 Circuit?

5 A I would have to have more specific information.
6 I don't really know what you mean by determinations by
7 the Court.

8 Q Decisions.

9 A Decisions.

10 Q Right.

11 A Yes, there were decisions by the Court.

12 MR. MARTIN: Your Honor, I'm going to object to
13 this line of questioning. It's obviously beyond the
14 personal knowledge of this witness.

15 THE COURT: Overruled. That's what the
16 questions are seeking to determine.

17 BY MR. PENTELOVITCH:

18 Q And at the time you signed this Exhibit 382,
19 did you contemplate the possibility that there may be
20 litigation in state or federal courts as well as before
21 your agency arising out of the PolyMet permitting
22 process?

23 A Yes. I believe we did understand that there
24 could be multiple challenges in various jurisdictions.

25 Q Thank you. If you turn to page 3 of the

1 exhibit, under "Candidates for Consideration," you there
2 indicate four law firms you were considering, and then
3 you have a paragraph that begins, "Our primary criteria
4 in selecting these firms to advance to you was," and then
5 you list a number of things. But on the end of the third
6 line you say, "Secondarily, we looked at the firms'
7 expertise in air permitting and tribal litigation."

8 What kind of tribal litigation did you foresee
9 as possible at the time you signed this exhibit?

10 A I believe the question regarding tribal
11 litigation might have been on downstream receiving waters
12 potentially under the Clean Water Act of the NPDES
13 permitting.

14 Q Excellent. Thank you. You can set that
15 exhibit aside.

16 I'm handing you -- or I have handed you what's
17 been marked for identification as Exhibit 77, which I
18 believe is already admitted into evidence. I could be
19 wrong about that, and if not, I would offer it.

20 MR. MARTIN: I don't think it is, but no
21 objection.

22 THE COURT: I don't, either. Received.

23 BY MR. PENTELOVITCH:

24 Q Okay. Exhibit 77 is entitled "Records and Data
25 Management Manual," Minnesota Pollution Control Agency.

1 Is this a document with which you became familiar during
2 your tenure as commissioner of MPCA?

3 A In general terms, yes, but in specific, no.

4 Q Okay. Let's turn to page 4 of this exhibit.
5 You'll see "Page 4" on the bottom right-hand corner, I
6 believe.

7 A Yes.

8 Q There's a section there in bold type that says
9 "Specific Roles and Responsibilities," under which it
10 says, "In order to fulfill these statutory requirements,
11 all agency employees are responsible for following the
12 agency's Records and Data Management Policy (number
13 1-admin 8-12) as well as the requirements described in
14 this manual. This manual defines the following records
15 management-related requirements and responsibilities."
16 And the next section heading says "Commissioner," and
17 there's a paragraph there describing the commissioner's
18 responsibility.

19 Were you familiar with your responsibilities
20 under this exhibit during your tenure as commissioner?

21 A Yes.

22 Q And you understood that you were "responsible
23 for creating and preserving records that adequately and
24 properly document the organization, functions, policies,
25 decisions, procedures and essential transactions of the

1 MPCA," correct?

2 A Yes. And I was responsible for making sure it
3 was delegated to the appropriate staff.

4 Q Turn next to page 5. On page 5, there's a
5 heading called "Deputy Commissioners/Division
6 Directors/Section Managers/Supervisors." And it says
7 underneath, "The Deputy Commissioners, Division
8 Directors, Section Managers and Supervisors are
9 responsible for," and it lists seven bullet points,
10 correct?

11 A Yes.

12 Q Now, in March of 2018, Sharon [sic] Lotthammer
13 was a deputy commissioner, correct?

14 A Her name is Shannon Lotthammer.

15 Q I'm sorry. Did I say Sharon?

16 A You did.

17 Q Shannon Lotthammer. She was a deputy
18 commissioner, correct?

19 A Correct.

20 Q And she would have therefore had the
21 responsibilities laid out on page 5, correct, as a deputy
22 commissioner?

23 A She was an assistant commissioner, so that's --
24 yes, that would have been fair to say.

25 Q Okay. Turn, if you would, to page 7. Page 7,

1 do you see the bold-faced heading "What is a Record,"
2 question mark?

3 A Yes.

4 Q It says, quote, "Records," closed quote, "are
5 broadly defined by statutes and regulation to include all
6 recorded information, regardless of medium or format,
7 made or received by the agency or its agents under law in
8 connection with the transaction of public business and
9 either preserved or appropriate for preservation because
10 of their administrative, evidential, fiscal, historical,
11 informational or legal value."

12 Were you aware of that definition of records
13 during your tenure as commissioner?

14 A Yes.

15 Q And would you agree that the interactions
16 between the MPCA and the EPA in connection with the
17 PolyMet permitting constituted the transaction of public
18 business?

19 A Depends on the form of the interaction, but
20 generally, yes.

21 Q Okay. And would you agree with me that the
22 communications relating to the interactions between the
23 EPA and the MPCA were appropriate for preservation
24 because of their administrative, evidential, historical,
25 informational, or legal value?

1 A How do you define communications?

2 Q Records. Any written -- let's say -- okay. I
3 think that's fair. Any written communications between
4 the two agencies, whether it be emails, letters,
5 memoranda, sharing of technical data in writing, would
6 you agree that those constitute records under this
7 policy?

8 A If they had specific application to a matter
9 before the agency that pertained to our business, yes.

10 Q Thank you.

11 Turn to the next page, page 8, please.

12 You'll see a bold-faced heading in the center
13 of the page that says, "Record Types," and then a lighter
14 heading, the heading "Official Record." Do you see where
15 I'm looking?

16 A Yes.

17 Q And it says there, "An 'official record' is
18 broadly defined by statutes and regulation to include all
19 recorded information, regardless of medium or format,
20 made or received by the agency or its agents under law in
21 connection with the transaction of public business and
22 either preserved or appropriate for preservation because
23 of its administrative, evidential, fiscal, historical,
24 informational or legal value."

25 Did you have an understanding of this

1 definition of official record during your tenure as
2 commissioner?

3 A Yes.

4 Q And did you understand that the written
5 communications between the EPA and the MPCA relating to
6 the PolyMet permitting process constituted official
7 record of the MPCA?

8 A Written comments? Did I hear you correctly
9 that --

10 Q Written communications between EPA and MPCA
11 regardless of who initiated it. Did you understand that
12 those constituted official record of the MPCA?

13 A In general terms, I would say yes.

14 Q Turn, if you would, to page 10. In the center
15 of the page of -- I guess it would be the second full
16 paragraph following the bullet point, it says, "Working
17 papers pertaining to legal matters and financial concerns
18 of the agency may need to be retained. If there are
19 questions regarding working papers should be retained,
20 guidance should be sought from records management staff.

21 "Specific types of working papers include:"

22 Bullet point comments. And I'll skip the first
23 paragraph, but I'm going to read the second paragraph
24 there, and I'm going to ask you if this is a correct
25 statement of how you understood what was to be treated as

1 a -- I'm sorry. Let me read it, and then I'll ask the
2 question.

3 It says, "However, comments received from the
4 public and/or regulated community during a formal agency
5 comment process or those received during a formal review
6 by outside experts should be carefully documented for the
7 record - either by keeping the original comments
8 themselves, or, if the volume is extensive, by keeping a
9 summary of the comments and how they were used."

10 Did you understand that to be the rule during
11 your tenure as commissioner?

12 A Generally speaking, yes.

13 Q Turn to page 13, please. There's a heading in
14 bold-faced type that says, "Record Media Types." And
15 underneath, it says, "A record may be stored on any
16 media. Some examples include:"

17 And if you look, the fourth item down on the
18 left-hand column is "e-mail," correct?

19 A Yes.

20 Q And did you understand that emails could be
21 official records of the MPCA during your tenure as
22 commissioner?

23 A Yes.

24 Q Turn to page 14, please. Underneath the
25 graphic at the top of that page, there's a heading that

1 says, "Creation." It says, "Records are considered to be
2 'created' when they are written by or received at the
3 agency. Records should be added to the Agency's filing
4 system immediately or upon final approvals (whether
5 stored in paper or electronic form)."

6 Was that your understanding of what the rule
7 was during your tenure as commissioner?

8 A Generally speaking, yes.

9 Q Turn to page 15, please.

10 Approximately at the center of the page,
11 there's a heading "Maintenance and Use." It says, "While
12 a record is being actively used by the agency, it is
13 usually maintained on site. To be useful for
14 decision-making, long-term planning, and other analytical
15 activities, records need to be complete and have
16 integrity. This requires that:"

17 Bullet point, "records are not removed from the
18 agency unless allowed by the appropriate records
19 management procedure;"

20 Bullet point, "missing records be considered
21 unacceptable;"

22 And then there's a number of other bullet
23 points I won't read.

24 To the extent I read from page 15, would you
25 agree that that is a correct statement of what the rule

1 was while you were -- during your tenure as commissioner?

2 A In general terms, yes. I'm noting at the
3 bottom of each page a date. I'm curious when this
4 document was actually created.

5 Q I believe the date at the bottom of the page is
6 the date this copy was printed by the MPCA. That's my
7 understanding.

8 THE COURT: If a party considers this not to be
9 applicable to the case, I expect them to object, and you
10 should assume that it's applicable to the case unless
11 advised otherwise.

12 THE WITNESS: Thank you.

13 BY MR. PENTELOVITCH:

14 Q Turn, if you would, to page 21.

15 MR. MARTIN: Your Honor, with the Court's
16 permission, we would like a moment to check the date of
17 this document. We're concerned that it may be a version
18 that came out only recently. And let me also be clear.
19 If there is no salient difference, we're going to allow
20 this to proceed. But with your Honor's permission, we
21 would like to look --

22 THE COURT: Make it quick because --

23 MR. MARTIN: -- at it momentarily. We will.

24 THE COURT: -- this document is in evidence,
25 and there was no objection, which means you endorsed its

1 applicability to the case.

2 MR. MARTIN: Well, your Honor, I apologize.

3 THE COURT: If you made a mistake, I would like
4 to know real quick.

5 MR. MARTIN: Okay. Thank you, your Honor.

6 Your Honor, I'm reading on the table of
7 contents. It says "Version 2.0", thanks to my colleague,
8 and it does say October 2, 2019.

9 MR. PENTELOVITCH: Well, have you produced a
10 more recent version of it? Because I'm not aware of it.
11 Do we have --

12 MS. RAY-HODGE: Your Honor, this is a version
13 that was produced by MPCA as part of the discovery
14 process when we asked for -- in response to our requests
15 for production of documents when we asked for various
16 policies and procedures, this was a document that the PCA
17 provided to us in response.

18 THE COURT: Okay. We're going to proceed, and
19 if there's a material difference between the version
20 applicable to the time period at issue and this version,
21 we will take care of it, but not during court time today.
22 And if you intend to raise an earlier version as having
23 material differences from the present version, a material
24 difference is a difference between the version that you
25 claim is in effect and the one that's been received into

1 evidence as it relates to portions that have been
2 highlighted by counsel.

3 MR. MARTIN: I understand, your Honor. Thank
4 you.

5 THE COURT: So we're proceeding on the basis
6 that everything being reviewed by counsel is
7 unquestionably applicable to all periods of time relevant
8 to this case.

9 BY MR. PENTELOVITCH:

10 Q Showing you next page 21 under the bold-faced
11 heading "E-mail." It says, "E-mail includes all
12 electronic messages created and received by staff
13 members - including their attachments. Staff members
14 should treat e-mail messages the same way they handle
15 paper correspondence. An e-mail is a record if it
16 documents the agency mission or provides evidence of a
17 business transaction or staff would need to retrieve the
18 message to find out what had been done or to use it in
19 other official actions."

20 I'm going to ask you, sir, do you recall
21 whether this language or substantially this language was
22 in your -- in the MPCA records and data management manual
23 during your tenure as commissioner?

24 A Generally speaking, yes.

25 Q Thank you.

1 Turn to page 24, please. At the top of the
2 page under the bold-faced heading, "Retention Schedule,"
3 it says, "The agency is required by statute to maintain a
4 retention schedule for all of its official records. A
5 retention schedule describes the type of records owned by
6 the agency and dictates how long they are kept. The
7 length of time records are kept is decided by the agency
8 Records Managers in consultation with program staff. (At
9 times, record retention is dictated by statutory
10 requirements.) The MPCA retention schedule can be
11 accessed electronically at the below links." And then
12 there are some intranet links.

13 Sir, during your tenure as the commissioner of
14 MPCA, was this rule or something substantially like it in
15 effect?

16 A To my knowledge, generally, yes.

17 Q And was there a retention schedule established
18 by the MPCA that was in effect during your tenure?

19 A To my knowledge, generally, yes.

20 Q Turn to page 25, please. Following the bullet
21 points at the top of the page, the following appears:
22 "Records may be disposed of only as governed by the
23 agency's retention schedule and applicable laws regarding
24 records disposition."

25 Sir, during your tenure, was this rule or one

1 substantially similar to it in effect?

2 A I would have to generally say yes, but I --
3 that's my recollection, yes.

4 Q Thank you. Turn to page 27, please. Under the
5 heading "Working with Not Public Information" -- you know
6 what? I'm going to skip that. We don't need that.
7 That's not public information.

8 All right. We can put that exhibit aside.

9 MR. PENTELOVITCH: Evan, do you have
10 Exhibit 76? I'm missing 76 and 71. Oh, there's 71. I'm
11 missing 76. Excuse me, your Honor. I'll hand this to
12 the witness first.

13 Your Honor, Exhibit 76.

14 THE COURT: Thank you.

15 MR. PENTELOVITCH: For the record, Exhibit 76
16 is a document produced by the MPCA from its -- which is a
17 copy, I believe. It's a printout from its website that
18 is headed "Records Management."

19 I would offer Exhibit 76.

20 THE COURT: Hearing no objection, it's
21 received.

22 BY MR. PENTELOVITCH:

23 Q Mr. Stine, looking at Exhibit 76, which is, as
24 I indicated, a printout from a website of the MPCA, are
25 you familiar with these pages?

1 A In general, yes. They look like intranet pages
2 from the agency's intranet page.

3 Q Are you familiar with the fact that this
4 document was online during -- or a document substantially
5 similar to this was online during your tenure?

6 A To my knowledge generally, yes.

7 Q And looking at the first page, it says, "What
8 is a Record?" And I'm not going to read it into the
9 record, but that is substantially the same definition as
10 we just saw in the manual, correct?

11 A Yes.

12 Q And the next heading is "E-mail messages are
13 records when..." And the third bullet point says, "they
14 are preserved, or are appropriate for preservation, as
15 evidence of the organization, functions, policies,
16 decisions, procedures, operations, or other activities of
17 the Government, or because of the information value of
18 the data they contain."

19 Was that provision or a substantially similar
20 provision in effect on the website while you were the
21 commissioner?

22 A To my knowledge, yes.

23 Q Under the heading "Points to remember about
24 e-mail," the third bullet point says, "Before deleting
25 any e-mail message, the author should determine whether

1 it meets the legal definition of a record and, if so,
2 preserve a copy of the message."

3 Was that provision or a substantially identical
4 provision in effect while you were the commissioner?

5 A Generally to my knowledge, yes.

6 Q If you turn to the next page where it says
7 "E-mail message" -- heading, "E-mail messages that may
8 constitute records," they list a number of bullet points
9 there. And I'm going to ask you -- I'm not going to read
10 them all into the record. But would you just read them
11 to yourself, and let me know if you see anything there
12 that you believe is inconsistent with what was on the
13 website during your tenure as -- let me rephrase that --
14 if you see anything there that you do not believe was in
15 substance on the website during your tenure as
16 commissioner.

17 A No. This looks generally consistent with what
18 I think would have been there.

19 Q All right. We'll move to the next exhibit
20 then.

21 Mr. Stine, I've handed you what's been marked
22 for identification as Exhibit 71, which is in the form of
23 a spreadsheet. And in the upper right-hand corner,
24 you'll note that it says, "Minnesota Records Retention
25 Schedule." And then on the next line, in the left-hand

1 column, it says, "Agency: Minnesota Pollution Control
2 Agency," and in the bottom left-hand corner is the date
3 "3/4/2010."

4 THE COURT: Hearing no objection, the exhibit
5 is received.

6 BY MR. PENTELOVITCH:

7 Q To the best of your knowledge, was this the
8 Records Retention Schedule at the MPCA while you were its
9 commissioner?

10 A Yes, to the best of my knowledge.

11 Q And notice on your authorization on the very
12 first page below the gray-scale box 7, it says,
13 "AUTHORIZATION: Under the authority of M.S.," which I
14 take it to mean Minnesota Statute, "138.17, it is hereby
15 ordered that the records listed on this application be
16 disposed per approved schedule."

17 I would like you to turn to the page -- the
18 page number in the lower right-hand corner is page 31.
19 And about three-quarters of the way down the page in the
20 gray scale or the highlighted area, it says, "Permitting:
21 Records documenting the permitting process. The
22 permitting process is an integral part of regulations and
23 regulatory compliance. A permit is a legal document that
24 describes how a facility is to meet regulations. It
25 contains legal conditions that are enforced by either or

1 a combination of the state, federal and local
2 governments."

3 And then in the column headed "New Record
4 Series Description," the first box -- or the only box in
5 the lower quadrant of the page says, "PRMT-1 Permitting
6 Records." And the second bullet point says, "Records
7 generated during permit development and issuance
8 processes" --

9 THE COURT: Slow down.

10 BY MR. PENTELOVITCH:

11 Q I'll start over. "Records generated during
12 permit development and issuance processes, includes
13 records documenting review, calculations, meeting/phone
14 logs, notes, permit drafts and final permit."

15 To the best of your recollection, is that an
16 accurate description of the records that were required to
17 be retained during your tenure as commissioner?

18 A Generally speaking, yes.

19 Q And you notice in the column "Retention Period"
20 is the letter "P."

21 Do you see that?

22 A Yes.

23 Q P means it's part of the permanent record,
24 correct?

25 A I don't know that. I would have to look at the

1 table or at a --

2 Q I don't believe it's --

3 A -- somewhere else in the document that gives me
4 the answer to that.

5 Q I'm not sure there is a table. At least I
6 couldn't find one. If there is, I would love it if
7 somebody would point it out to me.

8 So you --

9 A I don't find it.

10 Q Okay. All right. We will come back to that
11 perhaps with another witness.

12 I'm going to hand you another exhibit.

13 THE COURT: You may also want to determine from
14 the other attorneys whether that is something that can be
15 stipulated to.

16 MR. PENTELOVITCH: That's my intention
17 actually.

18 THE COURT: And if so, you can put that on the
19 record instead of calling a witness.

20 MR. PENTELOVITCH: All righty.

21 I'm going to hand you -- this is a new exhibit.
22 It currently appears, your Honor, as part of another
23 exhibit, but I want to have it as a stand-alone exhibit.
24 It's -- Exhibit 328 is the memorandum of agreement. Part
25 of the reason I want to use it this way is that it's

1 actually put together in the order in which the various
2 amendments were entered into as opposed to the attachment
3 to the email, which is a little bit more haphazard.

4 THE COURT: Hearing no objection, it's
5 received.

6 BY MR. PENTELOVITCH:

7 Q Mr. Stine, Exhibit 328, the first page is
8 entitled "Memorandum of Agreement Between the
9 United States Environmental Protection Agency and the
10 Minnesota Pollution Control Agency for the Approval of
11 the State NPDES Permit Program." And then it goes on for
12 a number of pages. If you look, you'll see that at page
13 18 it's signed by the Region 5 Administrator at the time
14 and by the chairman of the MPCA, Harold Field, Jr. and by
15 the executive director Grant Merritt, M-e-r-r-i-t-t. And
16 then the rest of it I'm not going to ask you about, but
17 those are amendments. I want to particularly ask you
18 about the part of Exhibit 328, pages 1 through 18.

19 During your tenure as commissioner, did you
20 ever read Exhibit 328?

21 A I don't recall.

22 Q Okay. Prior to becoming commissioner, were you
23 ever involved in the process for issuing an NPDES permit?

24 A I had involvement in a permit for a project on
25 the St. Louis River estuary that was related to site

1 restoration. I may have in my days as a hydrologist at
2 the DNR submitted comments to the Pollution Control
3 Agency on NPDES permits. Those are some possible
4 examples, but that was a long time ago.

5 Q Is there somebody who you relied upon during
6 your tenure -- well, let me -- let me ask you this
7 question as a predicate. At any time during your tenure,
8 did you ask any person employed by the MPCA, either as an
9 employee or a contractor, to explain to you any portion
10 of the memorandum of agreement, Exhibit 328?

11 A I don't recall.

12 Q Turn, if you will, to page 9. Are you with me?

13 A Yes.

14 Q Section 124.46, Subdivision 1. I would like
15 you to read that paragraph and tell me if you ever read
16 that paragraph or have any other familiarity with that
17 paragraph.

18 THE COURT: Read it to himself?

19 MR. PENTELOVITCH: Read it to himself, yeah,
20 not out loud.

21 THE WITNESS: (Reading document.)

22 Okay. I've read it. What's your question
23 again?

24 BY MR. PENTELOVITCH:

25 Q Do you recall whether at any time during your

1 tenure you read this section or became familiar with it
2 in any way?

3 A I was generally aware that the agency submitted
4 its materials regarding NPDES public notices and other
5 related matters to the region, to EPA Region 5.

6 Q Other than being generally aware that the
7 permits -- or that there was a submission to Region 5,
8 were you aware of the mechanics during your tenure of how
9 that process worked with Region 5 from beginning to end?

10 A Not in specific detail, no.

11 Q Did you have a general understanding?

12 A I had a general understanding of which part of
13 the agency conducted that work.

14 Q And what part of the agency conducted that
15 work?

16 A It would have been the water permitting staff
17 in -- depending on the form of the permit, there could
18 have been a couple of different divisions that would have
19 handled it.

20 Q Did you have an understanding of all the steps
21 involved in submitting a draft of final permits to EPA
22 for comment or approval from beginning to end? Did you
23 understand that process during your tenure as
24 commissioner?

25 A In general.

1 Q Tell us what your understanding was.

2 A The agency received a permit application. The
3 agency determined the permit application be complete or
4 incomplete. Upon determining the application be
5 complete, the matter was put forward for public review on
6 a public notice. That -- depending on the size, scope,
7 and other parameters of the project and that the public
8 notice would then be notified to the public through a
9 variety of forms, there may be public information
10 meetings regarding the notice during the notice period;
11 there may not. There was a date certain when the public
12 notice period began, a date certain when the public
13 notice period closed, and then the drafting of the
14 permit. And throughout that entire process, there would
15 be development of information related to the permit by
16 the staff working with various folks within EPA and
17 within the agency.

18 Q Now, were you aware that during your tenure as
19 commissioner that the EPA provided written comments
20 during the public notice period on approximately 40
21 occasions?

22 A I'm not aware of that exact number. I'm aware
23 that they did provide -- the agency had almost 18,000
24 permits at any one given time, so 40 -- depending on
25 which categories they fall, it seems like we had a few.

1 Q And do you know the details of how many days
2 the EPA had to comment or how many days the public had to
3 comment at various stages?

4 A That I would have to have deferred to the staff
5 for the specific periods.

6 Q Okay. I'm going to ask you to turn in that
7 document to page 16, please. Page -- are you there?

8 A Yes.

9 Q Page 16, the paragraph (2) says, "This
10 Memorandum of Agreement may be modified by the Agency and
11 the Regional Administrator following the public hearings
12 to evaluate the State's Section 402(b) program submittal
13 and the hearing on the proposed NPDES regulation on the
14 basis of issues raised at the hearings. The hearing
15 records shall be left open for a period of 20 days
16 following the hearings to permit any person to submit
17 additional written statements or to present views or
18 evidence tending to rebut testimony presented at the
19 public hearings. Any revision" -- and this is the part I
20 want you to focus on. "Any revisions of the Agreement
21 following each of the public hearings or otherwise shall
22 be finalized, reduced to writing, approved by the Agency,
23 and signed by the Director, and Chairman of the Agency,
24 and the Regional Administrator prior to forwarding of the
25 recommendations of the Regional Administrator to the

1 Administrator of EPA for review and approval."

2 My question to you is, at any time during your
3 tenure as commissioner of the Minnesota Pollution Control
4 Agency, was this process followed to modify the
5 memorandum of agreement?

6 A I don't know. I don't recall having any
7 modification of the agreement that I would have
8 completed.

9 Q If you look at the next page, at the top of the
10 page, "(3) All agreements between the State of Minnesota
11 and the Regional Administrator are subject to review by
12 the Administrator of EPA."

13 Do you recall any occasion on which an
14 agreement to modify the memorandum of agreement was
15 reviewed by the EPA administrator during your tenure as
16 commissioner of the PCA?

17 A I don't recall.

18 Q All right. You recall that at some point in
19 time you engaged in discussions regarding whether or not
20 the PCA would ask the EPA to refrain from filing written
21 comments during the public notice period with respect to
22 PolyMet, correct?

23 A I recall having a conversation with the staff
24 about the timing of the EPA's comments.

25 Q Who do you recall having discussions with?

1 A Assistant Commissioner Shannon Lotthammer.

2 Q Anyone else?

3 A That's the one I recall.

4 Q Do you recall if anybody else was present when
5 you had those conversations?

6 A I don't recall.

7 Q In March of 2018, do you know who the Region 5
8 administrator of EPA was?

9 A I believe it was Cathy Stepp. She may have
10 been still acting.

11 Q And she was relatively new on the job, correct?

12 A Yes, relatively speaking, yes.

13 Q According to her LinkedIn page -- and we don't
14 know if this is accurate, but it says she became the
15 regional administrator in January of 2018. Does that
16 sound about right to you?

17 A I have no reason to dispute it.

18 Q Now, on March 7, 2018, you met with
19 Ms. Stepp during the Great Lakes Commission meetings
20 in Washington, D.C. Is that right?

21 A Yes. She was the speaker at our semi-annual
22 meeting.

23 Q What is the Great Lakes Commission?

24 A Great Lakes Commission is Interstate Compact
25 Commission formed by federal law and is comprised of

1 commissioners, a term used under federal law to represent
2 all of the Great Lakes state jurisdictions. The states
3 are empowered by federal law and by the Interstate
4 Compact to appoint delegations. Then each state ratified
5 the compact and with statutory provisions that, in
6 Minnesota, were passed during the 1960s. And the
7 Great Lakes Commission then is a body that works under
8 Federal law and under its compact to advance issues that
9 would protect and enhance the Great Lakes.

10 Q And for how long were you a commissioner on
11 that commission?

12 A I don't recall the specific term that I was
13 involved. I think I was alternate commissioner first.
14 It would have been in perhaps 2013. 2014 or '15, may
15 have been appointed as a commissioner to the Great Lakes
16 Commission and then served until my -- the end of my term
17 was October of 2019.

18 Q Now, prior to being the Region 5 director or
19 administrator, Ms. Stepp had been the commissioner, I
20 believe is the title, of the Wisconsin Department of
21 Natural Resources. Is that correct?

22 A That would be the secretary of the Wisconsin
23 DNR.

24 Q And did you know her in that capacity?

25 A I did. I had occasion to meet with her and

1 interact with her.

2 Q Now, there's an indication in some internal EPA
3 documents that PCA staff was going to talk to you about
4 the PolyMet permit and the timing of comments from EPA.
5 And that email is dated March 5, two days before you met
6 with Ms. Stepp in Washington, D.C. So my question to you
7 is: Do you recall whether prior to going to Washington
8 D.C., that you had any conversations with Ms. Lotthammer
9 or anyone else at PCA, say, between March 5 and March 7
10 about the stated desire and intention of the EPA to file
11 written comments on the PolyMet draft permit?

12 A No, I don't.

13 Q Do you recall whether you discussed the PolyMet
14 draft permit or the EPA's commenting on it with Ms. Stepp
15 while you were in Washington, D.C.?

16 A I don't recall, and I don't believe we talked
17 about it because she was there briefly to address the
18 commission.

19 Q Was the topic of her talk -- did it have
20 anything to do with issues related to PolyMet?

21 A No.

22 Q Mr. Stine, I'm handing you what's been marked
23 for identification as Exhibit 58, which is a chain of
24 emails, the top one of which is from you to Cathy Stepp
25 and Kurt Thiede dated March 12, 2018.

1 MR. PENTELOVITCH: I don't recall if this is in
2 evidence, your Honor. I don't believe --

3 THE COURT: Hearing no objection, if it wasn't
4 in evidence, it is received in evidence.

5 BY MR. PENTELOVITCH:

6 Q All right. First of all, who is Kurt Thiede?

7 A Kurt Thiede was an EPA employee. I believe his
8 title was chief of staff in Region 5 EPA.

9 Q Now, it's true, is it not, that until February
10 of 2019, just a few weeks before this email, he was
11 actually the deputy to Ms. Stepp at the Wisconsin DNR,
12 correct?

13 A I'm not sure what his role was at Wisconsin
14 DNR, but he was in upper management within Wisconsin DNR,
15 yes.

16 Q Right. And he was only at EPA a matter of
17 weeks at the time of this email, right?

18 A To my understanding, yes.

19 Q And he's actually the current Region 5
20 Commissioner, right, or Region 5 Director?

21 A I have no idea.

22 Q Oh, okay. In this email, which you also copy
23 Shannon Lotthammer on, you said, "Thanks for the" -- so
24 we're talking March 12 now. You saw Ms. Stepp in
25 Washington. Five days later, you say, "Thanks for the

1 phone conversation this morning, Cathy and Kurt. I am
2 looping in Shannon Lotthammer who serves as MPCA
3 Assistant Commissioner for Water. She will follow up
4 directly with Kurt regarding the Region 5 - MPCA
5 agreement I mentioned on our call."

6 So my first question to you is, what did you
7 mention about the Region 5 MPCA agreement in your call
8 with Ms. Stepp and Mr. Thiede?

9 A I believe I mentioned that we had an agreement
10 with Region 5 on early permit coordination for mining
11 permits that also allowed for the tribal governments to
12 receive an early copy of our draft permits. I believe
13 that was the case. But if you look on the subject of the
14 email, the main thing we discussed first in this call was
15 regarding the Minnesota House of Representatives Speaker
16 Kurt Daudt -- his name is misspelled -- and
17 Representative Dan Fabian's contact to EPA Region 5 and
18 their legislative proposal regarding sulfide water
19 quality standard and a variety of other things. So we
20 had -- the first thing we talked about was that.

21 Q So the email you referenced from Mr. Thiede is
22 dated March 8. And it says, "Cathy" -- I assume that's
23 Cathy Stepp, who is the addressee of the email -- "Just
24 to recap yesterday afternoon's conversation with Speaker
25 Kurt Doubt [sic] and Representative Fabian."

1 So "yesterday afternoon" would be March 7,
2 right?

3 A Yes.

4 Q And we know Ms. Stepp was in Washington, D.C.
5 with you on March 7. Was Speaker Daudt and Mr. Fabian
6 there as well?

7 A No.

8 Q Were you present for the conversation that
9 apparently took place on March 7 with Speaker Daudt and
10 Representative Fabian?

11 A No, I was not.

12 Q In your conversation on March 12, what did you
13 and Ms. Stepp and Mr. Thiede discuss about sulfide
14 standards?

15 A It was a general conversation. I was trying to
16 provide them with background about what our work had
17 been, the scientific work we were conducting and the
18 regulatory -- the rulemaking proposal that we were
19 advancing at the time. I was also explaining to them how
20 the legislative bodies were considering legislation,
21 would have preempted or established -- would have
22 preempted our work on a regulatory standard or would have
23 established a numeric standard completely of their own.

24 Q And that sulfide standard would be applicable
25 to PolyMet, right?

1 A Well, it would have had to have been
2 promulgated either by the agency as a rule, or it would
3 have had to have been passed into legislation and signed
4 by the Governor for it to have been applicable. But
5 there was wild rice in the receiving waters downstream of
6 PolyMet. It's conceivable. But it was not -- this
7 conversation had -- the conversation I had with Cathy was
8 not specific to how the permit standard would be written
9 or anything around PolyMet. It was really about the work
10 we were doing in general on water quality and sulfides
11 and wild rice.

12 Q Well, let's talk about -- well, you brought up
13 two subjects now, sulfides and wild rice. Now, we know
14 that sulfides can interact with oxygen and then with
15 mercury to create methylmercury, correct?

16 MR. MARTIN: Your Honor, I'm going to object.
17 We're straying into an area that's outside the scope.

18 THE COURT: Maybe, but not yet. The objection
19 is overruled because the question is aimed at developing
20 the context for the email and the conversations
21 associated with it.

22 And with that understanding, you can proceed.

23 MR. MARTIN: Thank you, your Honor.

24 BY MR. PENTELOVITCH:

25 Q And so my first question is what do the

1 sulfides have to do with the wild rice, and how does wild
2 rice relate at all to PolyMet? I guess that's two
3 questions.

4 A My knowledge is general about sulfides and wild
5 rice. I am not the expert on the science of sulfide and
6 the growth of wild rice. All I know is that the agency
7 was working on how the regulatory standards for wild rice
8 might be adjusted for water quality related to sulfide to
9 protect wild rice.

10 Your second question was how did wild rice --
11 was wild rice or sulfide applicable to the PolyMet
12 proposal.

13 Q Right.

14 A I believe the parameter -- sulfide as a
15 parameter could have been in their permit, but it was
16 also the fact that there were areas near and downstream
17 of the site that contained wild rice.

18 Q In your conversation with Ms. Stepp and
19 Mr. Thiede, did you discuss the issue of the sulfide
20 standards and how they might relate to PolyMet? Was that
21 any part of your discussion?

22 MR. MARTIN: Objection, your Honor, beyond the
23 scope.

24 THE COURT: Overruled.

25 THE WITNESS: No, not in specific terms to

1 PolyMet.

2 BY MR. PENTELOVITCH:

3 Q Why were you wanting to loop Ms. Lotthammer
4 into the conversation with the EPA officials regarding
5 the Region 5 MPCA agreement?

6 A Shannon was the assistant commissioner for
7 Water, so anything to do with water permitting was within
8 her purview of how the federal-state relationship worked
9 was part of her responsibility. [sic]

10 Q So are you saying that your looping
11 Ms. Lotthammer in to Mr. Thiede and Ms. Stepp had nothing
12 to do with PolyMet? Is that what you're saying?

13 A I don't recall. It was merely that whatever we
14 were going to discuss about the matter on water quality
15 standards for wild rice, whether it had to do with the
16 permit for PolyMet, Shannon would be the one who would
17 have the specific details that would assist the region.

18 Q Well, did Ms. Stepp or Mr. Thiede raise PolyMet
19 with you?

20 A I don't recall.

21 Q Do you recall if you raised it with them?

22 A I recall having a conversation with them about
23 the timing of their comments.

24 Q Okay. What was the conversation about the
25 timing of the comments?

1 A We had staff in the agency that had been
2 working to prepare a revised draft permit. The comments
3 that were submitted by the public were being reviewed and
4 responded to. And so the conversation was my concern
5 over efficient use of the staff's resources and the time
6 it was going to take them to prepare this revised draft
7 permit. I asked Ms. Stepp to consider whether it would
8 be possible to comment at a later time when we could
9 prepare a draft -- a revised draft permit so that their
10 comments could address the most up-to-date information.
11 It seemed to me that we were working on a draft permit
12 that would have incorporated hundreds of comments and
13 responded to hundreds of comments from the public and
14 that their comments could be made more effectively once
15 they saw the revisions to that draft permit, because our
16 staff were really working hard to prepare a draft at that
17 point in time.

18 Q During your tenure at PCA up to that point,
19 March 12 of 2018, had you ever before asked the EPA to
20 defer making written comments until after the public
21 notice period had passed?

22 A I don't recall.

23 Q You don't recall one way or the other, or you
24 don't recall doing so?

25 A I don't recall doing so.

1 Q Were you aware on March 12, 2018, that if the
2 EPA gave written comments during the public notice period
3 that those would become part of the administrative record
4 in the event of any appeal?

5 A Only in general terms. But I did not consider
6 it as part of the conversation I had with Ms. Stepp.

7 Q Was it part of PCA's litigation strategy to
8 prevent -- or strike that.

9 Was it part of PCA's litigation strategy to
10 persuade EPA not to put written comments in the record
11 that would be available to the court of appeals for
12 review?

13 A Not to my knowledge, no.

14 Q So your testimony is this was simply an
15 efficiency matter on your part, and it was the first
16 time, to the best of your recollection, you had ever made
17 that request, correct?

18 A That's correct.

19 Q And you knew that that was not the regular way
20 that PCA and EPA had been doing business up until then,
21 right?

22 A Well, it was based on what I knew at the time
23 about this project and the permit and the workload that
24 the staff were handling, so I was -- whether or not it
25 was like anything in the past I wouldn't have known. But

1 I knew that we were significantly burdened by responding
2 to the comments and that the staff were working hard to
3 prepare that revised draft.

4 Q Do you recall anything else that you said to
5 Mr. Thiede and Ms. Stepp during that phone conversation?

6 A Not in specific terms, but I know that there
7 was conversation regarding the early sharing of draft
8 permits between the agency and the tribal nations on
9 mining permits.

10 Q Tell us about that conversation.

11 A Just that we had agreed in principle with the
12 tribal governments to provide them with the notice when
13 we sent it to EPA, so that I was informing Ms. Stepp and
14 Mr. Thiede that we had incorporated that practice of
15 sharing information with the tribal nations when we
16 shared with EPA.

17 Q So is that PolyMet-specific, or was it more
18 generalized?

19 A More generalized.

20 Q Okay. What else do you recall discussing
21 during that phone conversation?

22 A I don't recall.

23 Q What do you recall Ms. Stepp saying in response
24 to your comments?

25 A Generally, my recollection was she appreciated

1 the update on the wild rice and information regarding
2 the Speaker and Representative Fabian's inquiry. She
3 said that she would take it under advisement and that
4 Kurt Thiede would be the one who would follow up if
5 anything would need follow-up.

6 Q And at the time you had this conversation, did
7 you have any reason to believe that Ms. Stepp had any
8 knowledge of what the prior practice had been as between
9 the EPA and the PCA with respect to EPA making written
10 comments during the public notice period?

11 A Could you repeat that question?

12 MR. PENTELOVITCH: Can we have it read back,
13 your Honor?

14 THE COURT: If you could read it back, Lori.

15 THE COURT REPORTER: "And at the time you had
16 this conversation, did you have any reason to believe
17 that Ms. Stepp had any knowledge of what the prior
18 practice had been as between the EPA and the PCA with
19 respect to EPA making written comments during the public
20 notice period?"

21 THE WITNESS: I had no reason to believe that
22 she did or believe that she didn't know what the practice
23 was.

24 BY MR. PENTELOVITCH:

25 Q What about Mr. Thiede? Same question: Did you

1 have any reason to believe that he knew what the prior
2 practice between EPA and PCA had been with respect to EPA
3 filing written comments during the public notice period?

4 A I had no reason to believe he did and no reason
5 to believe he didn't.

6 Q Okay. Do you recall saying to Mr. Thiede or
7 Ms. Stepp -- I'm sorry. Let me rephrase that.

8 Do you recall that in your conversation with
9 Ms. Stepp you, quote, complained about the planned
10 comments, closed quote, from EPA?

11 A No.

12 MR. PENTELOVITCH: I'm going to show the
13 witness an exhibit solely for the purpose of refreshing
14 his recollection.

15 THE COURT: All right. Just identify it when
16 you do.

17 MR. PENTELOVITCH: It's Exhibit 353.

18 Do you want a copy or not?

19 THE COURT: Sure. I will guarantee it does not
20 refresh my recollection.

21 MR. PENTELOVITCH: I would bet not.

22 BY MR. PENTELOVITCH:

23 Q I'm handing you a document that I will tell you
24 was sent from an individual named Jeffry Fowley, retired
25 EPA attorney, to the EPA Office of Inspector General.

1 And I want to draw your attention to the last paragraph
2 of page two. And I would like you to just read that to
3 yourself and tell me if that refreshes your recollection
4 as to whether or not you complained about the planned
5 comments to Ms. Stepp.

6 A It does not refresh my memory, and I continue
7 to say I did not complain.

8 MR. PENTELOVITCH: Thank you. I think I'll
9 take that back since it's not an official exhibit.

10 Your Honor, I'm about to get into another
11 document. Do you want me to keep going or --

12 THE COURT: I think we're at a transition, and
13 we can conclude for the day. I'll give you back this
14 document, my copy as well. It's not yet been offered.

15 MR. PENTELOVITCH: Thank you.

16 THE COURT: Just a second.

17 All right. Mr. Stine, we're going to be done
18 for the day. Look forward to seeing you again to start
19 your testimony again at 9:00 tomorrow morning. Come in
20 time so you're ready to go at that time. All right?

21 THE WITNESS: Will do.

22 THE COURT: We're adjourned for the day. Is
23 there any business that we need to take care of before we
24 adjourn?

25 MR. MARTIN: Just a minor housekeeping matter.

1 My --

2 THE COURT: Should Mr. Stine be here for the
3 housekeeping matter?

4 MR. MARTIN: Your Honor, this has nothing to do
5 with testimony, so he doesn't have to be here.

6 THE COURT: You can go if you want.

7 THE WITNESS: Thank you.

8 THE COURT: Don't burn the carpet when you
9 leave.

10 Should this be on the record?

11 MR. MARTIN: No. It doesn't have to be.

12 THE COURT: We can go off the record.

13 (Proceedings were adjourned for the day at 4:44 p.m.)

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1 STATE OF MINNESOTA)
) SS.
 2 COUNTY OF RAMSEY)

3
 4 REPORTER'S CERTIFICATE

5 I, Lori Morrow, Registered Merit Reporter,
 6 Registered Professional Reporter, Certified Realtime
 7 Reporter, Certified LiveNote Reporter, Certified
 8 Broadcast Captioner, and Notary Public in and for the
 9 State of Minnesota, do certify that I am an official
 10 court reporter in and for the County of Ramsey, Second
 11 Judicial District, State of Minnesota, and that I
 12 reported the foregoing proceedings in this matter, and
 13 that the transcript contained on the foregoing
 14 pages 211 through 424 constitutes a true and accurate
 15 record of the proceedings had in the above-entitled
 16 matter at the said time and place stated herein.

17
 18 Dated: March 2, 2020.

19
 20 

21 _____
 22 Lori L. Morrow, RMR, RPR, CRR, CBC, CLR
 23 Official Court Reporter
 24 Ramsey County Courthouse, Chambers 1470
 25 15 West Kellogg Boulevard
 St. Paul, Minnesota 55102
 (651) 266-8281
 Notary Public, Minnesota
 My commission expires: January 31, 2025

RAMSEY COUNTY DISTRICT COURT
 SECOND JUDICIAL DISTRICT